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In The

Supreme Court of the United States

October Term, 1997

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,

Petitioner,

v.

JOHN M. KELLEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule of law adopted by the First Circuit, which is that a trial court may refuse to give a properly requested jury instruction concerning the appropriate regard for an employer's business judgment in assessing whether proffered reasons for termination were a "pretext," and which is in conflict with a directly contrary ruling of the Eighth Circuit and inconsistent with a ruling of the Second Circuit, incorrectly states the law and violates the purpose and intent of Congress in enacting ADEA?

PARTIES TO THE PROCEEDING BELOW

The petitioner is Airborne Freight Corporation d/b/a Airborne Express ("Airborne"). The respondent is John M. Kelley ("Kelley"). There are no parent or subsidiary companies to be listed pursuant to Rule 29.1.

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OPINIONS BELOW

The final opinion of the Court of Appeals (Stahl, J.), holding that it was not error for the trial judge to refuse to give the jury a business judgment instruction and upholding the judgment entered by the District Court, is reported at 140 F.3d 335 (1st Cir. 1998) ("Opinion #2"), and is reprinted in the appendix hereto, at pages 1A to 48A. The opinion originally issued by the Court of Appeals (Torruella, C.J.) ("Opinion #1"), reversing the district court verdict on the ground that the judge erred in failing to give the jury a business judgment instruction, but then subsequently withdrawn, was published at 1997 Daily Lab. Rep. (BNA) No. 174, at E-1 (1st Cir. Sept. 3, 1997), and is reprinted in the appendix hereto, at pages 49A to 64A.

JURISDICTION

Petitioner appeals from a judgment entered by the First Circuit on April 7, 1998. Petitioner filed a timely petition for rehearing with suggestion for rehearing *in banc* on April 21, 1998. The petition was denied on May 20, 1998. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides in material part as follows:

§ 623. *Prohibition of age discrimination*

(a) *Employer Practices.* It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

. . .

(f) *Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause.* It shall not be unlawful for an employer, an employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located[.]

STATEMENT OF THE CASE

This is a petition for review of a decision of the United States Court of Appeals for the First Circuit affirming a multi-million dollar jury verdict entered

against Airborne by the United States District Court for the District of Massachusetts (Garrity, J.) on Kelley's age discrimination claims under ADEA and state law.

Airborne's principal business is the delivery of time sensitive packages in the United States and worldwide. It is divided into two divisions – sales and field services – which work cooperatively at Airborne's regional locations. At the time he was terminated by Airborne, Kelley was one of five Regional Field Service Managers ("RFSMs"). As an RFSM, Kelley managed the field services operations of Airborne's Northeast Region, which consisted of the New England states and much of New York. He took this position in July 1987. Mr. Kelley was terminated by Airborne in March 1993, at the age of 46 years with 19 years of service at Airborne.

Kelley's presentation to the jury emphasized that he had received a "superior" performance evaluation only a few months before his termination, that Airborne had not followed its progressive disciplinary guidelines to address his performance problems during the winter of 1993, and that he had not been warned that his job was in jeopardy. Kelley's counsel argued to the jury that his termination was "wrongful" and "messy." A. 1896. He urged the jury to find Airborne's reasons for terminating Kelley pretextual if they were not "good reason[s]," A. 1866, to make a "fair assessment" of Kelley's performance for Airborne, A. 1869, and to find Airborne "guilty of a wrongful termination." A. 1896.[1]

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[1] Citations to the Joint Appendix filed with the First Circuit appear herein as "A. ___." Citations to the Addendum filed by

At trial, Airborne presented evidence that Kelley's performance had been inconsistent during the previous several years. Airborne explained that it had terminated his employment due to a series of customer service crises occurring in the months following the performance evaluation Kelley received in December 1992, which led to an irreparable breakdown in the relationship between the Northeast regional service organization, headed by Kelley, and its Northeast regional sales organization, headed by Regional Sales Manager James Guiod (then age 51). The uncontradicted evidence at trial established that Guiod and Kelley "hated each others' guts."[2] A. 2315.

Airborne's evidence established that Guiod complained to Kelley's immediate supervisor, William Simpson, in early March 1993 that "there had been a wall put up between our sales department and our field service department, and there was absolutely no working relationship, and that our field service services department would not respond to the needs of the customers." A. 1399. Simpson testified that he investigated Guiod's complaint by meeting with district sales managers in the Northeast region, and concluded that the relationship between service operations and sales "was worse than it had ever been in any station or any region I've ever seen

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Airborne with its principal brief to the First Circuit appear herein as "ADD. ___." Citations to the opinions of the First Circuit and to any other item reprinted in the Appendix to this Petition appear as "___A."

[2] There was no evidence to suggest that Guiod's animosity toward Kelley had anything to do with Kelley's age. Guiod was five years older than Kelley. A. 1624.

since I've been in transportation." A. 1403. Simpson testified that he decided to terminate Kelley at that time, concluding that "it had gotten to the point that it was just unbearable, and . . . there was no way that . . . Kelley could ever turn it around and get it back on the right track." A. 1403-04.[3]

Kelley did not present any direct evidence of discriminatory bias against him at trial.[4] In Opinion #1, which

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[3] The trial judge asked several questions during the trial that suggested to the jury that they could question Simpson's and Guiod's business judgment in setting the criteria for evaluating Kelley's performance. *E.g.*, "Isn't the principal thing that's looked at from you, in your position, from your regional sales managers under you to the local district managers under them, isn't what really counts, the bottom line of profit? . . . How do you compare the ability of a man to generate profits for the company with the ability to, you know, be a management leader and all the rest, . . . isn't that sort of frosting on the cake? . . . If you've got someone that's making the company a lot of money, that's of equal, if not greater importance, to some of these side personality points?" A. 1351, 1352; "Can I please ask a question about, you know, the danger of losing all of these accounts, the accounts aren't getting what they expect; is that true? . . . " "Did you ever think . . . that your sales people were overpromising these customers?" A. 1598.

[4] The only evidence offered by Kelley arguably supportive of age-based animus involved two isolated and ambiguous remarks allegedly made by Airborne executives. Kelley testified that, some nine or ten months before his termination, he attended a management meeting at which a senior human resources executive discussed the criteria to be utilized in selecting people for layoff in a reduction in force. According to Kelley's uncorroborated testimony, the executive "said there would be weighted averages or various items, such as the performance reviews, salary, the times – the time served with the Company, age, things of that nature." A. 780-81. Kelley also

reversed the verdict for failing to give the business judgment instruction, the First Circuit characterized the evidence of age bias as "indirect and far from overwhelming." 57A. There was no evidence that anyone made any remarks about Kelley's age. Simpson, who made all material employment decisions and evaluations concerning Kelley, was fifty years old. There was no evidence that managers similarly situated to Kelley who were not in the protected age category were treated differently, no statistical evidence suggesting age discrimination in Airborne's employment practices, no evidence of any discriminatory corporate policies at Airborne, and no evidence of any invidious pattern of age-related discharges, layoffs or early retirements at Airborne.

At the appropriate time, Airborne requested that the trial court instruct the jury as to the appropriate deference to be given to the employer's business judgment

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testified that, at the same meeting, his boss said to him "in substance" that "this would be an excellent opportunity to get rid of some of the older mediocre managers. . . . " A. 781-82. Kelley was not affected by the reduction in force. Kelley's boss unequivocally denied making a comment about getting rid of "older mediocre managers," and testified that he had never heard the human resources executive say anything to the effect that age would be a factor in layoff decisions. A. 1358-59. The human resources executive had no recollection of any such meeting, A. 1193-94, but testified that there were 34 employees, including several managers, whose jobs were eliminated during the reduction in force in the summer of 1992; and that when Airborne determined which employees would be selected for layoff, if two individuals were in the same type of position and had equal performance or competence, it would lay off the employee with the least seniority and retain the more senior employee. A. 1190-93.

when assessing whether its reasons were "pretextual" under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973). Specifically, Airborne asked the Court to instruct the jury that:

> Mr. Kelley must show more than that Airborne made an unwise business decision, an unnecessary personnel move, or acted arbitrarily. The law does not stop Airborne from discharging an employee for any reason (fair or unfair) or for no reason at all, so long as the reason to discharge him does not stem from his age. Good faith errors in [an] employ[er's] business judgment are not, standing alone, evidence of age discrimination.

A. 172-73. Airborne renewed its request for this instruction after the trial court failed to so charge the jury. ADD. 43-44. The Court again declined to give the requested instruction.

The jury returned a verdict against Airborne. Judgment was entered in Kelley's favor on both the ADEA claim and the state-law claim. Thereafter, the trial court considered Airborne's post-trial motions for judgment as a matter of law, for a new trial and for remittitur. The trial court denied the first two motions, and granted in part and denied in part Airborne's motion for remittitur. On August 14, 1996, the trial court entered a revised, final judgment against Airborne in the amount of $3,136,858.

Airborne filed a timely notice of appeal. After oral argument, the First Circuit (Torruella, C.J.) issued a written opinion and judgment dated September 3, 1997 ("*Opinion #1*), *reversing* the District Court's verdict and

remanding for further proceedings. Agreeing with Airborne in Opinion #1, the First Circuit held that the District Court committed reversible error when it failed to make "clear to the jury that it is the employer's motivation, rather than its business judgment, that is at issue." 57A. In so holding, the panel relied upon the teaching of *Loeb v. Textron*, 600 F.2d 1003, 1019 (1st Cir. 1979), that in giving jury instructions a court "should . . . , especially when a management level job is involved, explain that an employer is entitled to make its own subjective business judgments, however misguided they may appear to the jury, and to fire an employee for any reason that is not discriminatory." The Court also recognized that the Eighth Circuit had already ruled on this issue:

> At least one of our sister circuits requires that the trial judge give a business judgment instruction when requested by the defendant.

56A, citing *Stemmons v. Missouri Dep't of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996), and *Walker v. AT&T Tech.*, 995 F.2d 846, 849 (8th Cir. 1993). The Court stated that failure to give Airborne's business judgment instruction cannot be dismissed as harmless. 57A. "The jury was presented with considerable evidence of conduct by Airborne that might be considered unfair, but that does not suggest discrimination on the basis of age. . . . Furthermore, the evidence of age discrimination was indirect and far from overwhelming." *Id.*

Kelley then filed a "Suggestion for Rehearing in Banc," asking the First Circuit to rehear his appeal and

revise its opinion. On December 19, 1997, without allowing any response from Airborne,[5] the Court issued an Order stating that it had granted the petition for *in banc* rehearing. However, on December 30, the Court issued another Order which revised the earlier order by "indicat[ing] that the petition is granted only to the extent that the panel has withdrawn the opinion issued on September 3, 1997 and a new opinion will issue."

On April 7, 1998, the original First Circuit panel changed course one hundred eighty degrees, concluding in a new opinion ("Opinion #2") that the trial court's failure to give the requested business judgment instruction was not error. 32A. The First Circuit's new opinion expressly rejected Airborne's contention, based in part upon the previously referenced Eighth Circuit precedent,

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[5] In accordance with Fed. R. App. P. 35, which states that "[n]o response shall be filed unless the court shall so order," Airborne did not file a response to Kelley's Suggestion for Rehearing. On or about December 2, 1997, Airborne learned that, by a memorandum dated October 30, 1997, Chief Judge Torruella had withdrawn the September 3, 1997 opinion which he had authored, and stated that the panel intended to issue a new opinion. Pursuant to Fed. R. App. P. 27, 35 and 40, Airborne promptly moved for leave to file a response to Kelley's Suggestion for Rehearing, asking for an opportunity to be heard with respect to arguments that Kelley was attempting to raise in his Suggestion for Rehearing and pointing out that those arguments were both novel and contradictory to Kelley's previous positions as stated in his initial ~~b~~riefs. Airborne specifically noted that Rule 40 states that "a petition for rehearing will ordinarily not be granted in the absence of . . . a request" for an answer to the petition. Airborne was never afforded an opportunity to respond to Kelley's new arguments as contemplated by Fed. R. App. P. 40(a).

that the trial court was required to give a business judgment instruction upon timely request of the defendant. *Id.* Without mentioning the contrary Eighth Circuit authority it had relied upon in Opinion #1, the First Circuit simply stated that, in its prior decisions, it "did not suggest that a business judgment instruction is required in all age discrimination cases." 32A n.6.[6]

The Court went on to affirm the District Court's judgment in its entirety. Airborne filed a timely Petition for Rehearing with Suggestion for Rehearing In Banc.

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[6] With respect to the business judgment issue, Opinion #2 states incorrectly that even if there were error under federal law, the state law claim would be unaffected because "Airborne does not suggest that the failure to provide the business judgment instruction constitutes reversible error under Massachusetts law." 32A-33A. In fact, Airborne specifically argued on appeal that Massachusetts "has likewise adopted the business judgment rule in construing chapter 151B[,] *Smith College v. MCAD*, 376 Mass. 221, 229, 380 N.E.2d 121, 127 (1978)," and that "the need for such an instruction in this case was even greater given the confusing 'pretext only' analysis applicable to Kelley's state-law claims. . . . If the trial court was correct that proof of pretext alone *requires* a plaintiff's verdict . . . , clear jury instructions on the meaning of pretext and the business judgment rule were even more indispensable." *See* Airborne's First Circuit Reply Brief, at 13 n.23 & 15.

Moreover, the First Circuit completely disregards the fact that the trial court specifically directed the jury that its finding on federal law was dispositive of the state law claim: "if you rule in favor of the plaintiff in the federal claim, it's automatic that he wins in the state. You get to the state claim only if he loses on the federal." ADD. 38. Clearly, the jury could not have considered the state law claim "independent" if it was instructed by the Court to find liability on the basis of the federal standard.

This petition was denied by the First Circuit on May 20, 1998. 65A-66A.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FIRST CIRCUIT'S RULING THAT A DISTRICT COURT MAY REFUSE TO GIVE A PROPERLY REQUESTED BUSINESS JUDGMENT INSTRUCTION CONFLICTS DIRECTLY WITH THE LAW EXPRESSED BY THE EIGHTH CIRCUIT, IS INCONSISTENT WITH A DECISION OF THE SECOND CIRCUIT AND VARIOUS STATE COURT DECISIONS, AND ALSO VIOLATES THE MEANING AND PURPOSE OF ADEA.

Certiorari should be granted in this case because (i) the First Circuit's decision has created a conflict with decisions of the Eighth Circuit on an important issue of federal law and is inconsistent with a recent Second Circuit decision and the decisions of various state courts; (ii) the First Circuit's resolution of this issue is wrong as a matter of law because it is inconsistent with this Court's decisions and violates the meaning and purpose of ADEA; and (iii) the large number of jury-trial discrimination cases facing this issue will benefit from the Court's consideration of the issue and the adoption of a consistent, easily understood rule. *See* Sup. Ct. Rule 10.

A. The First Circuit's Decision Creates a Conflict Between the Circuits on the Issue of Whether a Trial Court May Refuse to Give a Business Judgment Instruction upon Timely Request by the Defendant.

The First Circuit's decision that the trial court may refuse to give a "business judgment" instruction when properly requested by an ADEA defendant conflicts directly with a line of decisions from the Eighth Circuit Court of Appeals applying Title VII and ADEA. Most recently, in *Wolff v. Brown*, 128 F.3d 682 (8th Cir. 1997), the Eighth Circuit recognized that a business judgment instruction is "crucial to a fair presentation of . . . [an employment discrimination] case, [and] the district court *must* offer it whenever it is proffered by the defendant." *Id.* at 685 (emphasis added).

Wolff followed and adopted two earlier decisions, *Stemmons v. Missouri Dep't of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996), and *Walker v. AT&T Tech.*, 995 F.2d 846, 849 (8th Cir. 1993). In *Stemmons*, for example, the Court was presented with a claim of racial discrimination under Title VII. After a jury verdict for the plaintiff, the defendant appealed, alleging that the court had improperly rejected a proposed instruction that stated in part: "You should not find that the failure to promote plaintiff is unlawful just because you may disagree with the defendant's stated reasons or because you believe the decision was harsh or unreasonable. . . . " 82 F.3d at 819. Relying upon its earlier decision in *Walker* (which was an age discrimination case), the Court ruled as a matter of law that a "business judgment" instruction of this type was "crucial to a fair presentation of the case to the jury." *Id.*

(quoting *Walker*, 995 F.2d at 849). The importance of the instruction stemmed from the well-settled law that "an employer 'is entitled to make its own subjective personnel decisions . . . for any reason that is not discriminatory' [and] . . . 'courts have no business telling [employers] how to make personnel decisions.' " *Id.* (citations omitted). The Court stated explicitly that "the district court *must* offer [a business judgment instruction] whenever it is proffered by the defendant." *Id.* (emphasis added).[7]

The First Circuit in this case, by contrast, has rejected the notion that a business judgment instruction is either crucial to the fairness of the trial, as *Stemmons* and *Walker* hold, or that it is required, or that is error not to give the instruction. 30A-33A. Accordingly, there is a direct conflict between the decision of the First Circuit in this case and the decision of the Eighth Circuit which states that such an instruction *must* be given upon request.[8]

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[7] *Stemmons* did go on to find that the trial court's error in not giving the business judgment instruction was harmless error, but only because there was direct evidence of age discrimination. *Stemmons*, 82 F.3d at 821 (stating "in this case . . . the jury heard testimony that very strongly suggested that race affected the hiring decision," and contrasting *Walker*, where there was no testimony which "directly indicated" that age was a factor). The finding of harmless error in *Stemmons* does not affect cases, such as this one and such as *Walker*, where determination of unlawful bias turns on the issue of pretext.

[8] In *Touchet v. Halliburton Co.*, No. 94-8042, 1996 U.S. App. LEXIS 3353, *25 (10th Cir. Feb. 29, 1996), the Tenth Circuit issued an unpublished opinion with limited precedential value in which it held, without analysis, that it was not error for the trial court to refuse to instruct the jury that "the jury is not free to second guess a employer's age neutral business decisions." Notably, the Court did "not quarrel with the legal correctness"

The First Circuit's decision is also inconsistent with the Second Circuit's decision in *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26 (2d Cir. 1997). In that ADEA case, the Second Circuit recognized that it is crucially important for the jury to understand the role of the employer's business judgment. The Court noted that an employee may be discharged " 'on the basis of subjective business judgments, for any reason that is not discriminatory.' " *Id.* at 29 (quoting *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 921-22 (2d Cir. 1981)). And, the Court expressly rejected the notion that the failure to give correct instructions could be harmless when the instructions given "permitted the jury to infer discrimination based upon whether the jury found the employer's standards to be reasonable." *Id.* at 30. An appropriate instruction on the employer's business judgment was thus required, and a new trial was ordered.

Finally, the First Circuit's decision conflicts with decisions of a number of state courts which rely upon federal law in determining the parameters of state-law counterparts to ADEA. For example, the North Dakota Supreme Court held recently that if no business judgment instruction is given:

> The jury may erroneously base a finding of illegal employment discrimination merely on its views regarding the soundness of the defendant's business judgment, or its perceptions of

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of such an instruction. *Id.* This case, as well, is evidence of the confusion and different standards applied by the Circuits on the issue presented by this Petition.

> fairness, unless the defendant is given the benefit of an instruction cautioning the jury that it may not base a decision on such considerations. . . . To avoid error on remand, the trial court should instruct the jury that employers do not need "just cause" or even "cause" to discharge at-will employees.

Schuhmacher v. North Dakota Hosp. Assoc., 528 N.W.2d 374, 382 (N.D. 1995). *See also Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 78 n.33, 479 S.E.2d 561, 588 n.33 (1996) (approving business judgment instruction as "crucial" to a fair trial and stating that "[c]ourts simply have no business telling employers how to make personnel decisions").

B. Reversal of the First Circuit's Holding is Necessary to Honor Congressional Intent and Make *McDonnell Douglas* Burden Shifting Understandable and Workable in the Context of Jury Trials.

The Eighth Circuit is correct in holding that an appropriate business judgment instruction is critical to a fair trial in employment discrimination cases involving pretext, and in *requiring* that the trial court give such an instruction upon timely request by the defendant. Accordingly, this Court should grant certiorari and reverse the decision of the First Circuit in this case.

A business judgment instruction is an essential part of the familiar approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), as most recently explained and illuminated by this Court

in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-18 (1993). Under the *McDonnell Douglas* analysis, once the defendant has articulated one or more non-discriminatory reasons for its actions, the presumption created by the *prima facie* case is dispelled and the plaintiff must prove that the articulated reasons are a "pretext" for intentional discrimination on the basis of age. *Burdine*, 450 U.S. at 252-56.[9] At all times the plaintiff bears the ultimate burden of proof. *Hicks*, 509 U.S. at 518. The Court was clear: "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false and that discrimination was the real reason." *Id.* at 515 (emphasis added).

Within this context, there are at least three compelling reasons why a Court should not be allowed to refuse to give an appropriate instruction on the business judgment of employers in an age discrimination case.

First, the instruction is necessary to protect the employer's prerogatives, as Congress intended under ADEA. As this Court stated in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995):

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[9] This Court has held that the *McDonnell Douglas* approach does not apply to cases where there is direct evidence of discrimination, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), a holding which does not apply in the present case, where both the parties and the Court considered this to be a "pretext" case. In prior cases, the Court has assumed, without expressly deciding, that the *McDonnell Douglas* approach is applicable under ADEA. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct").

> The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees.

See also Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) ("Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice"); *id.* at 242 ("The other important aspect of the statute is its preservation of an employer's remaining freedom of choice."); *Burdine*, 450 U.S. at 259 ("[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose [the employer] to Title VII liability. . . . "). In *McKennon*, the Court was rightly sensitive to construing ADEA so as to prevent "undue infringement upon the employer's rights and prerogatives." 513 U.S. at 362.

Although in this case the First Circuit has adopted an erroneous standard, its own words in an earlier case confirm the importance of an instruction on the employer's business judgment:

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory, but does not have to be a reason that the judge or jurors would act on or approve. . . . An employer is entitled to make his own policy and

> business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.
>
> [While] [t]he reasonableness of the employer's reasons may . . . be probative of whether they are pretexts[,] . . . *[t]he jury must understand* that its focus is to be on the employer's motivation, . . . and not on its business judgment.

Loeb v. Textron, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) (emphasis supplied). *See also id.* at 1019 ("The court should also . . . explain that an employer is entitled to make its own subjective business judgments, however misguided they may appear to the jury, and to fire an employee for any reason that is not discriminatory.").

ADEA itself embodies in the statutory language the intention of Congress to respect an employer's business discretion. In particular, Congress stated in ADEA that differential treatment of older persons is not prohibited "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Congress obviously intended to protect the employer's business prerogatives, and not to allow the jury to overrule the employer's business judgment.

Second, a business judgment instruction is critical to ensuring that age discrimination cases do not turn into general claims of "wrongful discharge," as is likely to occur if courts refuse to give legitimate business judgment instructions. The Circuit Courts have recognized, without exception, that an employer is permitted to fire an employee unfairly, arbitrarily, without "just cause," or even with ill will, so long as it did not terminate the

employee because of age. *See e.g., Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990).[10]

Other courts have recognized that arguments based upon the "fairness" or "just cause" of the defendant's business justifications "must not be allowed to creep into

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[10] *See also Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *Ruiz v. Posadas de San Juan Assoc.*, 124 F.3d 243, 250 (1st Cir. 1997) ("We do not assume the role of a super personnel department, assessing the merits – or even the rationality – of employers' non-discriminatory business decisions."); *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997) (same); *Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985) ("the ADEA is not intended to be used as a means of reviewing the propriety of a business decision on the part of the employer"); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982) (the right of an employer to make a subjective judgment to discharge an employee for any reason that is not discriminatory "is especially true when . . . a management level job is involved.").

The same rule of law applies under Massachusetts discrimination law. A discharged at-will employee cannot recover for unlawful discrimination simply by proving that the decision to terminate his employment was "unsound or even absurd" or even that it was "arbitrary or unwise." *Matthews v. Ocean Spray Cranberries*, 424 Mass. 122, 128, 686 N.E.2d 1303, 1309 (1997). "The defendant is not required to persuade the fact finder that it was correct in its belief." *Id. See also Smith College v. MCAD*, 376 Mass. 221, 229, 380 N.E.2d 121, 126 (1978) (Explaining that a "managerial decision may be unsound or even absurd, but, if the reason given for the decision is the real reason and is nondiscriminatory," the employee is not entitled to relief). Thus, Airborne was permitted to discharge Kelley for any nondiscriminatory reason.

an employment discrimination lawsuit." *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1085 (6th Cir. 1994); *see also Schuhmacher*, 528 N.W.2d at 382. The discrimination laws "do[ ] not require that employers fire employees only for just cause, nor do[ ] . . . [they] require that employers follow their own internal rules governing work-related discipline." *Rolark v. University of Chicago Hosps.*, 51 FEP Cases (BNA) 1230, 1232 (N.D. Ill. 1989). *See also Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 151 n.7 (5th Cir. 1995) (ADEA does not prohibit employers from firing people within the protected age class without cause).

Third, an appropriate instruction is critical to preventing the jury from becoming confused as to the applicable law. This Court was forceful in *Hicks* when it stated that jury instructions on the pretext issue *must* be clear: "Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review." *Hicks*, 509 U.S. at 524.

Indeed, courts have repeatedly recognized that the entire *McDonnell Douglas* burden shifting paradigm is confusing and presents a considerable challenge in the jury trial setting. The First Circuit has itself stated:

> *McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood

> legalisms to decide the ultimate question of discrimination.

Loeb, 600 F.2d at 1016. The concept of "pretext" is precisely the type of "poorly understood legalism" that must be explained with care to a jury.

Therefore, in assessing whether an employer's reason is a pretext, it is critically important that the jury be instructed that an arbitrary or unfair reason – even a malicious reason – is not a pretext. The jury must also be instructed that it must not second-guess the validity or wisdom of the employer's justification.[11] As one court correctly put it,

> The question for the jury is *not* whether the employer exercised prudent business judgment, but whether the employee has come forward with persuasive evidence to refute that the articulated, legitimate reasons motivated the employer.

Skaggs, 198 W. Va. at 74 (emphasis added). An appropriate business judgment instruction prevents the jury from "misunderstand[ing] the ultimate issue of discrimination vel non . . . [and] ensures that the jury may reach a fair

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[11] Similar instructions designed to ensure that the jury does not seek to second guess the defendant's business judgments when assessing "pretext" are given in other areas of the law as well. *See, e.g., Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1213 (9th Cir. 1997) (in assessing whether an alleged monopolist's business purposes under the Sherman Act are pretextual, the trier of fact cannot " 'second guess whether [the defendant's] business judgment was wise or correct in retrospect.' ").

result, consistent with the mission of the anti-discrimination statutes." Susan L. Grebeldinger, *Instructing the Jury in a Case of Circumstantial Individual Disparate Treatment: Thoroughness or Simplicity?*, 12 Lab. Law. 399, 419 (1997).

As well-ingrained as the business judgment principle is in the statutory fabric of ADEA and in the appellate jurisprudence construing it, the need to avoid second-guessing an employer's business judgment is far from intuitive to a lay jury. Indeed, the notion that a long-serving management level employee may be lawfully discharged without warning for reasons that fall short of good cause may seem completely foreign to a juror who has worked in a unionized setting or a civil service environment. For this well-settled legal principle to be applied, a trial judge must explain it carefully and appellate authority must leave no room for confusion on the need to incorporate such an essential tenet of discrimination law into jury instructions.

The significance of the trial court's failure to give an appropriate business judgment instruction upon request of the defendant is revealed by this case. The trial judge made several comments undermining Airborne's business judgments concerning the event central to its articulated reason for terminating Kelley – the breakdown in relations between the regional sales and service organizations. A. 1351, 1352, 1598. At trial, Kelley's counsel argued and asserted, incorrectly, that the jury could and should substitute its judgment for that of Airborne's management. He asserted that the jury should find Airborne's reasons for terminating Kelley pretextual if they were not "good reason[s]," A. 1866, that the jury should make a "fair assessment" of Kelley's performance for

Airborne, A. 1869, and that it should find Airborne "guilty of a wrongful termination," A. 1896.

With the issue so posed, the trial court should have clarified the confusion by issuing clear, precise and appropriate instructions focussing the jury's deliberations on an appropriate evaluation of Airborne's subjective motivation, rather than the jury's own sense of "fairness." By rejecting Airborne's requests for an instruction on the business judgment rule, the trial court effectively left the jury on its own, free to impose its own brand of industrial justice.

C. The Question Presented is an Important and Recurring Issue of Federal Law That Has a Significant Impact upon Employment Discrimination Litigation in Federal Courts and on the Employment Relationship

The question presented here is important and is likely to recur in other cases under ADEA, as well as under Title VII, under 42 U.S.C. § 1981, and under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101.

While this Court has recognized a right to jury trial under ADEA in certain cases since *Lorillard v. Pons*, 434 U.S. 575, 581 (1977), the number of jury trials in discrimination cases has increased significantly since Congress provided a right for jury trials in Title VII cases in 1991, *see* Section 102 of the Civil Rights Act of 1991, 105 Stat. 1073, 42 U.S.C. § 1981a(c) (1988 ed. Supp. III), and since Congress enacted the Americans With Disabilities Act with jury trial rights, 29 U.S.C. § 626 (1988 ed. Supp. III).

Because, in the overwhelming majority of those cases, the plaintiff's claim is based solely upon circumstantial evidence of discrimination and is litigated under the *McDonnell Douglas* paradigm, the precise issue raised here will arise frequently.[12] If the *McDonnell Douglas* model is to retain its utility in the context of expanded jury trial rights, then the governing legal principles must be explained in terms that a jury can understand.

In *Hicks*, this Court reaffirmed its statement in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), that "[t]he question facing triers of fact in discrimination cases is both sensitive and difficult." *Hicks*, 509 U.S. at 524. The First Circuit's willingness to tolerate manifestly incomplete jury instructions on the core legal principle of deference to an employer's business judgment, if allowed to stand, will serve to distort the discrimination statutes and undercut the flexibility

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[12] The Statistical Division of the Administrative Office of the United States Courts reports that in the 12 months ending June 30, 1998, there were 21,871 lawsuits commenced in federal district courts pertaining to civil rights claims in private employment settings. Statistical Tables for the Federal Judiciary, June 30, 1998 (forthcoming).

The Equal Employment Opportunity Commission reports that in Fiscal Year 1997, it received charges of employment discrimination from 80,680 individuals. Of that total, 15,785 individuals alleged they were victims of age discrimination in violation of ADEA. This figure represents a slight increase from the 15,719 individuals who filed charges of age discrimination with the EEOC in Fiscal Year 1996. EEOC Headquarters, National Charge Database, Data Summary Report (Apr. 17, 1998).

that Congress intended to preserve for employers in running businesses as they see fit subject only to the prohibitions on discrimination.

In addition, the First Circuit's tacit invitation to allow trial courts to reject employer requests for a business judgment instruction will necessarily impact the workplace itself and disrupt the balance between protecting employees from unlawful discrimination and preserving employer discretion to make business judgments in taking personnel actions.[13] Rules of law do not just affect how a given case is tried; they also affect how businesses are run. Allowing courts to refuse to instruct juries appropriately changes the delicate balance in the workplace that Congress intended to create in enacting ADEA and other discrimination statutes.

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[13] For example, if an employer is left in doubt as to whether a jury ultimately will be instructed clearly about the legal principles underlying the business judgment rule, the prudent employer will become more reluctant to discharge an employee in a protected class and will defer action until it becomes confident that a lay jury will view its personnel decision to be objectively correct. Conversely, if an employer knows that a jury must be instructed to defer appropriately to its business judgment, the employer will not be forced to delay action or be tempted to bolster the real reason for discharging an employee in anticipation of how a jury will react to the decision in litigation.

CONCLUSION

For the foregoing reasons, Airborne respectfully requests that this Court grant its petition for writ of certiorari in this case.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 96-2057

JOHN M. KELLEY,

Plaintiff, Appellee,

v.

AIRBORNE FREIGHT CORPORATION d/b/a AIRBORNE EXPRESS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr., *Senior U.S. District Judge*]

Before

Torruella, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

James W. Nagle, with whom *Wilfred J. Benoit, Jr.*, *Anthony M. Feeherry* and *Goodwin, Procter & Hoar LLP* were on brief for appellant.

Stephen S. Ostrach and *Cynthia L. Amara*, New England Legal Foundation, on brief for Associated Industries of Massachusetts, amicus curiae.

David G. Hanrahan, with whom *Ross D. Ginsberg* and *Gilman, McLaughlin & Hanrahan, LLP* were on brief for appellee.

April 7, 1998

STAHL, *Circuit Judge*. Defendant/appellant Airborne Freight Corporation ("Airborne") appeals from a jury verdict in favor of plaintiff/appellee John Michael Kelley ("Kelley"). After a ten-day trial, a jury found that Airborne had wilfully discriminated against Kelley on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA") and knowingly violated its state law counterpart, Mass. Gen. Laws ch. 151B ("ch. 151B"). The district court accordingly entered judgment for Kelley in the amount of $1,244,152.24 on the ADEA claim, $3,136,858.29 on the ch. 151B claim and awarded attorney fees of $190,000. Airborne seeks a new trial, contending that (1) various evidentiary rulings affected the verdict and (2) the jury instructions were incomplete and misleading. In addition, Airborne claims that the district court improperly calculated the damages. We disagree and affirm.

I.

Background

On appeal we examine the facts, consistent with record support, in the light most favorable to the verdict-winner. *See Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 151 (1st Cir. 1990).

Airborne delivers time-sensitive packages. In 1974, at age twenty-eight, Kelley quit college to join Airborne as a District Manager in Tucson, Arizona. Kelley rose through the ranks, progressing through a series of jobs with increasing responsibility. During the mid-1980s, the Northeast Region, which consists of the New England states and most of New York, was beset by operational problems that were undermining sales in the Boston area. Airborne asked Kelley to transfer from Miami to Boston to improve the company's operations in the region. In July 1987, at age forty-one, Kelley was promoted to Regional Field Services Manager ("RFSM") for the Northeast Region.

Airborne is divided into two divisions: sales and field services. The sales division sells Airborne's services and maintains active client accounts. The field services division, also referred to as "operations," is responsible for ensuring the timely delivery of parcels. As RFSM, Kelley was in charge of the operations side of the business for the entire Northeast Region.

President and Chief Operating Officer Robert Brazier was in charge of both divisions nationally. Executive Vice President Raymond T. Van Bruwaene, who reported to Brazier, managed three Area Vice Presidents, including Kelley's supervisor, William Simpson. Kelley was one of five RFSMs working under Simpson. Regional Sales Manager James Guiod, was in charge of the sales division in the Northeast Region. Guiod and Kelley were at the same managerial level and essentially ran the region together with divided responsibility. Richard Goodwin directed Airborne's human resources division.

Airborne performs annual reviews of its managers and collects various data to assess their performance. During Kelley's initial tenure from mid-1987 to mid-1990, the reviews he received from Simpson were mixed. Although the quality of Airborne's service in the region improved, the region demonstrated some continuing problems in meeting profit goals.

In a review conducted in June 1990, Simpson was critical of Kelley's management skills. Betsy Tate, a lower-level manager in Rochester, New York, had complained to Simpson that Kelley was sexually harassing her. Simpson confronted Kelley concerning Tate's complaints and issued him a verbal reprimand. In a written review, Simpson noted that the region had failed certain "quality-of-service" audits, that Kelley at times displayed a sexist attitude, and that he failed to follow company policy on sexual harassment. Simpson placed Kelley on probation and informed him that, if improvements were not made, he would be discharged at the end of the year, but if improvements were made, Simpson would try to have the incident removed from Kelley's record.

Despite these management problems, Kelley's region enjoyed some notable successes. In January 1988, Brazier instituted an incentive program called the "Top Gun" Contest, which awarded $10,000 to the pair of Sales Managers and RFSMs who had the greatest volume increase in domestic and international outbound express shipments and revenue each quarter. Between 1988 and 1991, Guiod and Kelley won the Top Gun award four times, more than the managers in any other region, prompting Brazier to commend them in December of 1991 for "being

better at selling and servicing than any of [their] peers." Each letter spoke of Kelley and Guiod in glowing terms.

Following the June 1990 review, Kelley apparently made the improvements Simpson requested. In his evaluation covering the period from October 1990 to October 1991, Simpson rated Kelley as "Superior to Outstanding" in each performance category: service, productivity, cost control, net profit, progress toward improvement, problem solving, leadership/management skills, knowledge and technical competence, and communication skills.

In late September 1992, Simpson received several complaints about local service failures within Boston. For reasons that remain less than precisely clear, Airborne had developed a practice of sending all packages originating in Boston – including those destined for Boston-area delivery – on airplanes to Ohio, where the packages destined for local delivery were sorted and then routed back to Boston. Despite this circuitous delivery route, local packages were still delivered on-time the next day unless the airplane suffered a mechanical failure or there was a weather-induced delay which made the packages late on arrival. These mechanical failures occurred on a number of occasions, which understandably prompted complaints from three Boston customers (Thomas Cook, Bank of Boston, and Teradyne) because they saw no need to send local packages to Ohio for sorting. Simpson verbally directed Kelley to set up a local "sort" process to obviate the need to send local packages on this seemingly unnecessary round-trip. Although service failures were a consistent occurrence in the delivery business, mistakes like the sort problem caused Airborne to lose customers, straining the relationship between Kelley and Guiod.

During this time, Simpson complained about the inept performance of a manager under Kelley's supervision, Bob Cox, who was also Kelley's brother-in-law. Cox managed the region's North Shore Station, a station beset with operational problems. The most notorious gaffe involved an incident in which a driver from Cox's station failed to deliver over one hundred parcels for Miles Agfa, a new multi-million dollar national account, leaving the parcels on a truck parked on Airborne's lot for an entire weekend. Company policy required supervisors to accompany drivers when first servicing large new accounts, but Cox failed to do so. As required by the company's progressive discipline policy, Kelley gave Cox time to improve his performance but eventually fired him in February 1993.

In the summer of 1992, shortly after having suffered a minor stroke, Kelley attended a meeting with Simpson, Goodwin, Van Bruwaene, and other RFSMs from Simpson's area regarding a planned reduction in force ("RIF"). Goodwin, who managed the Human Resources Division, informed those present that age was one of the relevant characteristics in deciding whom to fire. Simpson said, in substance, that the RIF would "be an excellent opportunity to get rid of some of the older mediocre managers" in Area 1.

That summer, Airborne terminated thirty-four employees as part of the RIF, including the oldest manager in Kelley's region, who was in his mid- to late forties.

In 1992, a price war broke out between Airborne and Federal Express, placing considerable pressure on managers to meet customer expectations. During this time, the company regularly performed quality-of-service audits to measure the efficiency of the operations within a region. In July 1992, Kelley's region, which Airborne admitted was one of the more difficult regions in the country to manage, was the only region under Simpson's control that met Airborne's goal of delivering ninety-five percent of the packages before noon. In August 1992, Simpson informed the RFSMs that Kelley's region had passed all quality-of-service audits and congratulated him for this accomplishment. In October 1992, Simpson sent an E-mail message to his subordinates recognizing Kelley's Northeast Region for having the best average score of any region in the company on quality of service audits conducted during the year. In November 1992, Simpson again congratulated Kelley for "tearing them up" because the region continued to perform well on the quality of service audits. As a result, Simpson informed Van Bruwaene that Kelley was performing quite well. Van Bruwaene was "elated" with Kelley's performance, agreeing that Kelley's region was performing well as measured by the audits.

On December 5, 1992, three and one-half months prior to his termination, Kelley received his annual performance review from Simpson. Airborne used the appraisals to "determine how various people of various management levels are doing in comparison to others of the same job." Kelley received a nine – the highest score possible – in the "progress toward improvement" category and a "superior rating overall." When providing

Kelley recommendations for further improvement, Simpson wrote:

> You have made significant improve [sic] in 1992. Service is at an all time high in region. Quality of service audits have been excellent in past few months. Driver/Owner costs need constant attention.

The performance review did not mention any specific service complaints from Boston-area companies, any problems regarding sexual harassment, the Boston "sort" problem, Kelley's management of the Cox situation, or any other management problems. In early March, Kelley believed that he was performing so well that he asked Simpson for a promotion to vice-president.

On March 10, 1993, the Board of Directors voted to give Kelley stock options. The letter from the Chairman of the Company, Robert S. Cline, stated:

> The Directors make these awards to key employees who continue to grow with the company and who they believe are capable of assuming greater responsibility in the years ahead.

On March 12, 1993, Robert Brazier, the President of Airborne, received a letter from the Bose Corporation, a Boston-based company, complaining that Airborne had failed to make a number of deliveries. The letter recounted that, when Bose complained to Airborne following the incident, an Airborne employee offered the excuse that the driver had been out sick. Brazier assumed that the problem had occurred in Boston and blamed Kelley for this unnamed employee's incompetence. Without having investigated the circumstances surrounding

the complaint, Brazier sent a vitriolic E-mail message to Van Bruwaene stating in part:

> This kind of stuff goes on every day when the regional and district management are not smart enough to sense it and fix it for good! I know you and I don't differ on Kelley, and I know Simpson doesn't agree with either of us. I am at the point where I don't give a damn what Simpson thinks or for that matter anyone else who chooses to ignore stupidity, mediocre performance, poor service, or the host of ways that we become aware of weak management. The more we tolerate this the longer we condemn this company to be mediocre or worse . . . and I have had enough of it.

The service failure that prompted the Bose complaint and Brazier's response had occurred in Milwaukee, not Boston, and was neither Kelley's fault nor in Kelley's region.

On March 15, 1993, Van Bruwaene responded to Brazier, his supervisor, agreeing with Brazier's assessment of Kelley He defended his own handling of the situation, saying that he and Simpson had been discussing Kelley for some time. He protested:

> I don't want you to believe that Bill [Simpson] or I for that matter, protect people who are not capable of doing the job.

At the same time, Van Bruwaene sent a copy of the Brazier E-mail to Simpson, scribbling on the bottom: "[Kelley] isn't worth putting our jobs on the line. Both of us should have known it earlier."

Van Bruwaene informed Brazier, after a "follow-up" conversation with Simpson, that they had decided to

terminate Kelley within the following two weeks. Van Bruwaene also forwarded Brazier's message to Goodwin stating:

> Attached for your information. Bill Simpson will be calling you for your help on this one. Hopefully we have enough data to avoid a wrongful termination.

On March 15, 1993, Simpson, although supposedly the decisionmaker, worked with Goodwin to orchestrate the mechanics of Kelley's dismissal. Goodwin drafted the termination letter, while Simpson provided the information justifying the decision in a telephone conversation and an E-mail message. At about the same time, Goodwin admitted that he had to be careful in drafting the termination letter because Kelley "was over forty years old." Goodwin created a written list of possible reasons, purportedly obtained from Simpson by phone, which included, *inter alia*, (1) "turnover of national accounts," (2) "not good with customers – no empathy," (3) the problems with Bob Cox, (4) sexual harassment of Betsy Tate, and (5) the intra-Boston sort problem. The list acknowledged that Kelley's "numbers" – referring to the statistical measures used to gauge a manager's performance – were "OK." In an E-mail message to Goodwin dated the same day, Simpson listed the Cox problem, the sort problem, complaints from major Boston customers, and that Kelley went golfing too much with his managers. Simpson ended the E-mail by saying "that is all I can think of right now." Three minutes later, though Kelley would be fired in eight days, Simpson sent an E-mail to Kelley castigating him for certain "reweigh reports" and demanding that he fix the situation. The

next morning, Simpson forwarded Kelley's response and the reweigh report to Goodwin, who was in the process of formulating Kelley's termination letter, as additional evidence to justify the coming termination. In a March 19, 1993 E-mail, Van Bruwaene wrote a memo to Goodwin and Simpson in which he stated that "this is going to be a messy termination."

On March 24, 1993, Simpson delivered to Kelley the termination letter, which contained five numbered paragraphs explaining the reasons for the termination. Notably, the letter did not mention the Bose complaint and Brazier's response. In fact, Brazier eventually learned that Kelley had not been responsible and testified that the incident was not the catalyst for Kelley's termination. Instead, the letter cited the following: (1) "a clear pattern of complaints about [Kelley] and [his] management style. . . . "; (2) procrastination and delays in following directions; (3) poor judgment and management behavior; (4) his "bullish" management style; and (5) Simpson's inability to obtain information from Kelley's region and his inability to build a team relationship with Kelley's managers. After nineteen years of service, Kelley was informed that March 24, 1993, would be his last day at Airborne. Kelley, then forty-six years old, was replaced with a thirty-seven year old manager.

The ten-day trial was primarily devoted to whether the reasons Airborne gave in the March 24, 1993, termination letter were the real reasons why Airborne fired Kelley. Kelley introduced evidence that his performance was superior, that the reasons given in the letter were not true, but rather were carefully selected to be unchallengeable in court, and that Airborne was biased against older

workers. Airborne contended that the reasons given in the letter were the real reasons for Kelley's dismissal.

The termination letter had claimed that Kelley's performance prompted customer complaints that required Brazier, Van Bruwaene, and another upper manager, Kent Freudenberger, to intercede. At trial, Brazier could not provide details of any specific instances in which he had to intercede because of Kelley, and admitted that, when he did have to deal with customer complaints emanating from Boston service failures, the incidents occurred mostly before 1991. In addition, he described his responses to customer complaints as routine sales calls and was unable to tie any of these complaints specifically to Kelley. Van Bruwaene could not identify specific instances when he had to intercede because of complaints concerning Kelley. Interestingly, Airborne chose not to call Freudenberger to testify. Although the termination letter claimed that Simpson "had to spend more time" dealing with customer relations and service problems in the Northeast than other regions, Airborne's data that measured the quality of service demonstrated the Kelley's region was performing as well, or better, than other regions.

The termination letter also claimed that "[p]rocrastination and delays in following directions and policy [was] another serious flaw in [Kelley's] performance as a senior operating manager." Cited as examples were complaints from Boston customers regarding the lack of a local sort process; Kelley's violation of company policy in hiring Cox, his brother-in-law, to report directly to him; and his fostering an environment which condoned sexual harassment. At trial, however, Airborne openly denied

that Kelley was fired for the sexual harassment of Betsy Tate. Airborne's attorney said in his opening that "We're not going to stand here and tell you that in 1993, after several years, we're going to take it out on Mr. Kelley concerning sex harassment . . . in the late 80s." In addition, at the time of the dismissal decision, Simpson was not aware of any other sexual harassment claims against Kelley. While Airborne accused Kelley of nepotism in allowing Cox to report to him, Van Bruwaene admitted that his son worked for Airborne. Further, Kelley had already fired Bob Cox on February 12, 1993, after having given him sixty days to improve his performance as the company's progressive discipline policy required. Although Simpson had mentioned the Boston sort problem verbally to Kelley in September 1992, there was no mention of the problem in his December 1992 evaluation, which rated Kelley "superior" in completing projects in a prompt manner.

In its termination letter, Airborne additionally claimed that it was firing Kelley for making poor management decisions, citing "[s]everal . . . employees [who] felt so strongly about the unfairness of management behavior that a letter was written to the President. . . . " The letter in question turned out to be from an anonymous employee complaining about thefts and lack of management at Cox's station and managers playing golf during the day. A former FBI agent whom Airborne had hired to investigate these allegations found the charges groundless and absolved Kelley of all fault in regard to this incident prior to his termination.

Further, Airborne's letter cited Kelley's "bullish" management style. This purported aspect of Kelley's

management style was never discussed as a problem in his evaluations, and Simpson testified that he saw Kelly [sic] "bully" someone on only one occasion. At trial, Airborne claimed that Simpson made up his mind to terminate Kelley in early March after meeting individually with two sales employees, Bob Jackson and Chris Beach, who worked for Guiod. In their meetings with Simpson, Jackson and Beach blamed service problems and loss of revenue on Kelley. Kelley was not informed of these meetings, nor was he given an opportunity to respond. Simpson claimed that, as a result of these meetings, he concluded that the relationship between sales and operations divisions in Boston was "unbearable, and . . . that there was no way Mr. Kelley could ever turn it around." Thus, after the meetings, he decided to terminate Kelley. The termination letter, however, described poor relationships between sale and operations as "not uncommon," and did not mention the complaints from Jackson and Beach. In short, Airborne's witnesses proffered a version of events that often seemed in conflict with other evidence adduced at trial, and they contradicted each other in attempting to explain Kelley's dismissal.[1]

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[1] Though we could recount more, a few examples will suffice. Brazier testified that the accolades heaped on Kelley in the "Top Gun" award letters were sincere. However, Goodwin, who actually drafted the letters for Brazier, tried to play down these accolades, stating that only Guiod deserved the award. Goodwin admitted on cross-examination that the "Top Gun" letters to Kelley were "phony as a three-dollar bill" and that, as the head of human resources, he would from time to time write things that were not true "to . . . carry out the purposes of Airborne."

Goodwin claimed that he helped draft Kelley's termination letter because Simpson did not have access to Simpson's

In its closing, Airborne argued that Kelley had been terminated because he was an incompetent manager and a liar, not because of his age. Counsel stated: "You may decide, if it had been me, I may have not done all of those things. That is not the issue. The issue is not whether your business judgment is the same as Mr. Simpson's business judgment. The issue is, what does this have to do with age? That's all there is. What does it have to do with age?"

Plaintiff argued that the reasons Airborne gave for firing Kelley were pretextual and that Airborne was biased against older workers. Counsel reviewed the reasons Airborne gave in its letter and argued that the testimony at trial showed that these reasons were not true, but were fabricated to justify firing Kelley. He argued that the reasons recited in the letter were carefully chosen from a list of potential reasons discussed by Goodwin and Simpson on March 15, 1993, and that those

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secretary. Simpson contradicted this, saying the letter could have waited until he had access to his secretary.

On cross examination, Simpson steadfastly denied sending the March 16, 1993, "reweigh reports" to Goodwin to create a factual record to justify Kelley's termination. First, he said he sent them for Goodwin's "information." Then he said he sent the reports because Goodwin had Kelley's personnel file, and Simpson did not want "to lose track of this document." Finally, on redirect, Simpson admitted that he sent them for Goodwin to use in the termination letter.

On numerous occasions, the Airborne witnesses blamed Kelley for problems with the national Thomas Cook account. Contradicting this claim, a September 1992 E-mail written by Simpson listed five main geographic problem areas with the account, none of which were in Kelley's region.

chosen were deliberately subjective factors not capable of being easily challenged in court. He also pointed out that there were no employees in Kelley's region who were over the age of forty-nine.

In charging the jury, the district court described, at length, the controlling law under the ADEA and ch. 151B. The jury was then provided a verdict form with Fed. R. Civ. P. 49(b) interrogatories. Question 2 asked whether the "plaintiff proved that his age had a determinative influence on defendant's decision to discharge him." If the jury answered Question 2 affirmatively, this finding was sufficient to enter judgment on both the state and federal claims. If the jury answered Question 2 negatively, they were to answer Question 3, which asked whether "the plaintiff has proved that the reasons stated for discharge stated in the March 24, 1993, discharge letter were pretextual – i.e., that they were intended to mask some other, unstated reason for the discharge." Question 4(a) asked whether "defendant knew the discharge was in violation of federal law prohibiting age discrimination or acted with reckless disregard of that law." Question 4(b) asked whether "defendant knew or had reason to know that the discharge was in violation of state law." The jury responded affirmatively to all the interrogatories except Question 3, to which it appropriately did not respond.

The jury awarded Kelley $253,442.08 in back pay damages, an amount to which the parties stipulated prior to trial. The jury also awarded $250,000 in emotional distress damages and $1,000,000 in front pay under ch. 151B, § 9. After the verdict, Airborne asked the district court to exercise its equitable power to order that Kelley

be reinstated as an "at-large RFSM," a position Airborne said it had created for him. After a two-day hearing, on June 11, 1996, the trial court found reinstatement impracticable and approved attorney's fees of $190,000. Airborne filed three additional post-trial motions: a motion for judgment as a matter of law, a motion for a new trial, and a motion for remittitur. The trial court denied the first two motions, but granted the motion for remittitur in part, reducing the emotional distress damages to $150,000. Applying ch. 151B, § 9, the district court endorsed the jury's finding of willfulness and imposed a multiplier of 2.25 to the back pay, the front pay, and the reduced emotional distress damages. The district court explained its reasons for applying the multiplier:

> [E]vent after event led me to believe that the testimony being offered by this parade of Airborne Express witnesses was not credible and that charges were being made against Mr. Kelley that were fanciful.
>
> . . .
>
> [I]t was clear to me that the discharge of Mr. Kelley was orchestrated deliberately and without restraint.
>
> . . .
>
> Mr. Simpson and Mr. Goodwin [tried] to portray to the jury a scenario simply contrary to fact.

The district court accordingly entered judgment against Airborne in the amount of $3,136,858 on the state claim.

II.

Discussion

Airborne contends that various erroneous evidentiary rulings, incorrect or inaccurate jury instructions, and questions asked by the district court were so prejudicial to Airborne that a new trial should be required. In addition, Airborne challenges the award of damages under ch. 151B, § 9. We consider each of these claimed errors in turn.

A. Evidentiary Rulings

Appellant presents myriad evidentiary claims. We review evidence questions for abuse of discretion. *See Cohen v. Brown Univ.*, 101 F.3d 155, 168 (1st Cir. 1996).

Airborne first contends that the trial court erred in excluding as hearsay the particular details of customer complaints made about Kelley to Brazier, Simpson and Guiod, which Airborne claimed formed part of the non-discriminatory basis for Kelley's dismissal. Airborne argues on appeal that it offered the complaints to show that Simpson was aware of their existence, not "for the truth of the matter asserted," and therefore the complaints did not constitute hearsay. *See* Fed. R. Evid. 801(c); *United States v. McKeeve*, 131 F.3d 1 (1st Cir. 1997). We agree that a customer complaint offered to show, for example, that a decisionmaker had notice of the complaint, rather than to prove the specific misconduct alleged in the complaint, is not barred by the hearsay rule. *See Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 575 (1st Cir. 1989); *see also F.T.C. v. Amy Travel Serv., Inc.*, 875

F.2d 564, 576 n.11 (7th Cir. 1991). We need not, however, analyze the admissibility of Airborne's excluded complaint evidence in detail because any error in excluding that evidence was harmless. *See* Fed. R. Civ. P. 61 (requiring the reviewing court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Assuming, for the sake of argument, that Airborne did offer some of the excluded evidence for a nonhearsay purpose, Airborne successfully introduced a copious amount of testimony and documentary evidence regarding customer complaints of which Simpson was aware when he discharged Kelley. Airborne thus had ample opportunity to present to the jury its theory that customer complaints led to Kelley's demise. The additional testimony at issue was, at best, cumulative.

Airborne next challenges the district court's application of Rule 403 in a number of instances. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Only rarely – and in extraordinarily compelling circumstances – will [this court] from the vista of a cold appellate record, reverse a district court's on the spot judgment concerning the relative weighing of probative value and prejudicial effect." *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988).

First, Airborne contends that the court wrongfully excluded, via Rule 403, certain "Leading Edge" E-mail reports that Guiod sent to Simpson describing service failures in the Boston area from November 1992 to March

1993 that Guiod believed could cause revenue losses. The district court excluded the reports, in part, because they were cumulative of other evidence concerning customer complaints in Boston. For the same reasons stated *supra*, the court was well within its discretion in making this determination.

Second, Airborne challenges the district court's decision to admit Airborne's Employee Relations Guidelines for Disciplinary Action ("Guidelines") over Airborne's timely Rule 403 objection. The Guidelines contained specific progressive discipline procedures managers were supposed to follow when faced with poorly performing employees. Kelley introduced the Guidelines to demonstrate that Airborne had failed to follow its own disciplinary procedures in summarily dismissing him after nineteen years of service. To the extent Airborne claimed to have terminated Kelley because of incompetence, Simpson's failure to follow a written company policy that required managers to take specific steps prior to discharging poorly performing employees was relevant to whether Kelley's incompetence was the true reason for his dismissal. *See Powers v. Grinnell Corp.*, 915 F.2d 34, 39 (1st Cir. 1990); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.*, 789 F.2d 253, 258 (3d Cir. 1986). In addition, the district court admitted the Guidelines only conditionally, instructing the jury that, if the defense offered "testimony . . . persuad[ing] you that [the Guidelines] would not be applicable to Mr. Kelley, [they] may not be considered in this case as part of the evidence." We see no abuse of discretion in the court's decision to admit the Guidelines.

Airborne raises a related claim that, once the district court had admitted the Guidelines, the court wrongly prevented Airborne from introducing rebuttal evidence that the Guidelines often were not followed and did not apply to Kelley. The district court did twice limit Airborne's questioning on the applicability of the Guidelines. When Airborne attempted to elicit testimony on cross-examination from Kelley about whether he had applied the Guidelines during his termination of an unrelated and lower-level employee, the court limited the inquiry stating that:

> the only issue is whether [the Guidelines] were applicable to [Kelley]. So, if you want to talk about the applicability of the Guidelines to regional managers, that's one thing; but when you start talking about employees to whom there's no issue, I think it's time not properly spent.

At recess, Airborne made an offer of proof that Kelley would have testified that he "considered the circumstances to be emergency circumstances; and, therefore, the Guidelines were not followed."

Rule 611(a) of the Federal Rules of Evidence states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time . . . [.]

Although the proffered testimony was perhaps tangentially relevant to the issue, the district court was frustrated by the extremely slow pace of the trial and

Airborne's circuitous presentation of evidence. The judge was within his discretion in limiting and focusing the scope of this inquiry in order to save time if there was no prejudice to appellant's case. *See Elgabri v. Lekas*, 964 F.2d 1255, 1259-60 (1st Cir. 1992). After reviewing Airborne's offer of proof – that Kelley may have once fired a subordinate without following the Guidelines – we find that the exclusion of this testimony could not have prejudiced Airborne.

In addition, the district court excluded testimony from Goodwin. When Airborne attempted to question Goodwin regarding the Guidelines, the district court interrupted and asked Airborne's counsel whether he planned to introduce "anything remotely different- . . . than we've heard from two or three witnesses already?" Counsel responded that the Guidelines hadn't "yet been read." The district court then excluded the testimony as cumulative. On the present record, however, we cannot determine whether Airborne suffered prejudice from the district court's exclusion of the evidence because Airborne failed to make an offer of proof at trial describing the substance of the excluded testimony. *See Earle v. Benoit*, 850 F.2d 836, 847-48 (1st Cir. 1988) (refusing to review a claim because appellant failed to make an offer of proof pursuant to Fed. R. Evid. 103(a)(2)). At no time did Airborne make an offer of proof that described the basic contours of the evidence Airborne planned to introduce through Goodwin in order to demonstrate that the Guidelines were not applied to managers similarly situated to Kelley. As a result, absent compliance with Rule 103(a)(2), we cannot assess the importance of the excluded evidence. *See id.* at 848. We thus find no error.

Third, Airborne objects to the admission of age-related comments made by Goodwin and Simpson. Kelley testified that in the summer of 1992, less than a year before his termination, Goodwin stated that age would be considered as a factor in selecting employees for termination in the RIF and Simpson said it would be a good time "to get rid of some of the older mediocre managers." Airborne argues that, because Goodwin did not make the termination decision, and the statements were temporally remote and not directed at Kelley, the judge abused his discretion by not excluding the evidence under Fed. R. Evid. 403. We disagree.

It is settled that statements made by decision makers can evidence age discrimination. *See Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 676 (1st Cir. 1996). In addition, statements by nondecisionmakers can be evidence that a discriminatory atmosphere pervades the workplace and infects the company's personnel decisions. *See Conway v. Electro Switch Corp.*, 825 F.2d 593, 600 (1st Cir. 1987). Simpson's remark had a direct bearing on age discrimination because Simpson made the decision to terminate Kelley. Similarly, Goodwin's remark was an alleged discriminatory statement by the head of human resources who participated closely in Kelley's termination and was in charge of the company's discrimination policy. Such a statement was at least admissible to show a discriminatory atmosphere. The statements were made less than a year before the termination while contemplating a reduction in force. As a result, we cannot say that the temporal relationship between the remarks and the termination was so attenuated as to render them irrelevant. *See id.* at 598. While certainly the statements "prejudiced" the

defendant, all probative evidence is prejudicial, and the district court did not abuse its discretion in finding that the statements were not *unfairly* prejudicial.

After reviewing Airborne's remaining evidentiary contentions, we find them either unpreserved or without merit.

B. Jury Instructions

Airborne contends that the district court committed reversible error by incorrectly instructing the jury as to the controlling principles of employment discrimination law. Airborne offers a host of objections: (1) the instructions incorrectly described the plaintiff's burden of proof; (2) the trial court erred by refusing to include instructions on business judgment, at-will employment, the "same actor" inference, and the meaning of the term "wrongful discharge"; (3) the trial court failed to comprehend the difference between an age discrimination case and a wrongful discharge case; and (4) an example that the trial court used to explain the concept of pretext was rambling and confusing. In Airborne's view, the cumulative effect of these errors was sufficiently prejudicial to warrant a new trial. We disagree.

We begin with a brief review of the controlling discrimination law. Because the plaintiff brought this action pursuant to the ADEA and ch. 151B, the case involved the delicate task of applying state and federal age discrimination laws that differ in some important, yet subtle, respects. Under both federal and Massachusetts law,

plaintiff must first establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Blare v. Husky Injection Molding Sys.*, 646 N.E.2d 111, 116 (Mass. 1995). The burden of production then shifts to the employer to articulate a non-discriminatory rationale for its employment action, which rebuts the employee's prima facie case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Under both Massachusetts and federal law, the plaintiff at all times bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him. *See id.* (quoting *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *Blare*, 646 N.E.2d at 117.

Federal and state law differ, however, in the role that pretext plays in enabling a plaintiff to meet his burden of proving that the defendant intentionally discriminated against him. In *Hicks*, the Supreme Court explained the role of pretext in federal discrimination cases that proceed under the *McDonnell Douglas* burden-shifting framework:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Hicks, 509 U.S. at 511 (emphasis added). Thus, under the ADEA, if the plaintiff establishes that the defendant's proffered reasons for the adverse employment action are

not the true reasons, the trier of fact may, depending on the overall evidence, but is not *required*, to infer that intentional age-based discrimination was a determinative factor in the adverse employment action. *See Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091-92 (1st Cir. 1995); *see also Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 343-44 (6th Cir. 1997) (collecting cases).

In contrast, "Massachusetts is a 'pretext only' jurisdiction." *Blare*, 646 N.E.2d at 117; *Carter v. Commissioner of Correction*, 681 N.E.2d 1255, 1264 (Mass. App. Ct. 1997).[2] Under the "pretext only" standard:

> [A] plaintiff who has established a prima facie case and persuaded the trier of fact that the employer's articulated justification is not true but a pretext, is *entitled* to judgment.

Blare, 646 N.E.2d at 116 (emphasis added) (citing *Wheelock College v. Massachusetts Comm'n Against Discrimination*, 355 N.E.2d 309, 315 (Mass. 1976)); *see also Lattimore v. Polaroid Corp.*, 99 F.3d 456, 465 (1st Cir. 1996) (citing *Blare*). The distinction matters: to prevail under Massachusetts law, a plaintiff carries "his burden of persuasion with circumstantial evidence that convinces the fact finder that

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[2] We recognize that the viability of *Blare* has been questioned in light of *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 128 (1997). We express no view on the matter. Here the jury affirmatively responded on the jury verdict form that age had a determinative influence on Airborne's decision to terminate Kelley, and thus did not premise its liability on a finding of pretext alone. Even assuming that the instruction was erroneous because it enabled the jury to impose liability under the lower standard, the jury could not have been so confused as to obviate its explicit finding of discriminatory animus.

the [employer's] proffered explanation is not credible." *Id.*; *see Handrahan v. Red Roof Inns, Inc.*, 680 N.E.2d 568, 573-74 (Mass. App. Ct.), *review denied*, 684 N.E.2d 1198 (Mass. 1997); *Powers v. H.B. Smith*, 679 N.E.2d 252, 255 (Mass. App. Ct. 1997); *see also Kline*, 128 F.3d at 343 (collecting cases and describing the "pretext only" standard).

We turn to Airborne's contention that the district court incorrectly instructed the jury on the plaintiff's burden of proof under state law. The district court described how both state and federal law require the plaintiff to prove the same prima facie case and explained that, under federal law, the plaintiff must prove that age had a determinative influence on his termination. In addition, the court explained that if the plaintiff proved that the defendant's stated reasons for terminating Kelley were pretextual, the jury should enter judgment in his favor on only the state claim. In relevant part, the district court verbally summarized Massachusetts law as follows:

> [A] plaintiff who has established a prima facie case and persuaded the trier of fact that the employer's articulated justification is not true but a pretext, is entitled to judgment.
>
> . . .
>
> Under the federal [law], it's the plaintiff's obligation to prove that age discrimination existed. Under the state law . . . if the employer comes up with reasons which you find to be pretextual, these [sic] enough. There is no requirement under the state law for the plaintiff to prove that the reason for his being discharged was age. It is done in a different fashion. It's in combination . . . with the prima facie case, that he was old,

> that he was fired, there was a younger man hired for the job . . . [plus] the giving of a package of false reasons, for the discharge, leads the state court to conclude that the only reason for giving the false explanation, given the prima facie case, would be prohibited discrimination, that he was fired for age.

The jury instruction thus endeavored, in simplified terms, to distinguish between the "pretext only" standard used in Massachusetts and the federal standard, which allows, but does not necessarily require, a jury to find discrimination if the defendant's reasons were pretextual – perhaps a difficult concept for a lay jury to understand.

Airborne argues that the district court misstated the plaintiff's burden of proof when it stated that "[t]here is no requirement under the state law for the plaintiff . . . to prove that the reason for his being discharged was his age." Airborne thus contends that the instruction on pretext implied that Airborne had the burden of persuasion on discrimination.

At first glance, the statement to which Airborne objects appears to support their claim because Massachusetts does, of course, require the plaintiff to prove age discrimination. The allegedly objectionable statement, however, was part of a longer discussion that involved not *who* had the burden to prove discrimination, but *how* the plaintiff could meet its burden of proving intentional discrimination under state law: by proving that the employer's stated reasons for the discharge were not the true reasons. The instruction, as a whole, correctly summarized Massachusetts law in this regard. Further, the

district court stated that Kelley, not Airborne, had the burden of proof at all times.

> Now, I keep talking about the plaintiff's burden. But I want it clear that the defendant has no burden. . . . It is not up to the defendant to prove that it was not his age that was the determinative influence, but it's up to the plaintiff to prove.

Reading the instructions as a whole, we see no risk that the jury failed to understand that, under ch. 151B, the plaintiff had the burden of proving that Airborne's stated reasons for terminating Kelley were not the true reasons.

Although Airborne suggests that Massachusetts is not a "pretext only" jurisdiction, that claim is directly contrary to *Blare* and its progeny. Under ch. 151B, Kelley had to prove that it was more likely than not that Airborne's stated reasons for discharging him were a pretext. *See Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 327 (1st Cir. 1996) (citing *Blare*, 646 N.E.2d at 118). Although perhaps inartful at times, the instruction adequately described state law. Airborne's counsel, despite repeated colloquies with the judge, simply refused to accept that Massachusetts is a "pretext only" jurisdiction.[3] The district court correctly refused Airborne's invitation to misread state law.

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[3] At a post-trial hearing, the district court stated:

> [I]n so many ways the Court finds that defendants do not understand and indeed have probably never understood the essential elements and the scope of the law of the Commonwealth of Massachusetts. Repeatedly during the trial I sought to alert the defendants to the Court's understanding of the state statute, and my efforts appeared to fall on deaf ears.

Airborne contends, second, that the court's refusal to provide a business judgment instruction at Airborne's timely request constitutes reversible error.[4] Airborne argues that a new trial is necessary because the cumulative effect of the court's inaccurate pretext instruction and the lack of a business judgment instruction left the jury with the "clear impression that it could substitute its judgment for Airborne's" and prevented the jury from "understanding Airborne's legal theory on the controlling issues of the case (the state of mind of the decision-maker)."

"In reviewing a court's decision not to give a particular instruction, our duty is to determine whether the instructions as given tend to confuse or mislead the jury with regard to the applicable principles of law." *Poulin v. Greer*, 18 F.3d 979, 983 n.3 (1st Cir. 1994). While perhaps a business judgment instruction might have been useful in this case, its omission does not provide a basis for undermining the adequacy of the charge as a whole. We cannot see how the jury could have thought that it was free to find that age had a determinative influence on Kelley's discharge if it merely disagreed with Airborne's business judgment. The district court instructed the jury, on more than one occasion, that Kelley could prevail on his federal

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[4] As part of its requested pretext instruction, Airborne requested the following charge:

> Mr. Kelley must show more than that Airborne made an unwise business decision, an unnecessary personnel move, or acted arbitrarily. . . . Good faith errors in an employee's business judgment are not, standing alone, evidence of age discrimination.

claim only if he proved by a preponderance of the evidence that he would not have been fired but for his age.[5] Interrogatory number 2, which the jury answered affirmatively, asked "has the plaintiff proved that his age had

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[5] The district court instructed the jury in the relevant part:

> The burden of proof at every stage in this case is on the plaintiff, meaning that a plaintiff must prove . . . each essential element of plaintiff's claim by a preponderance of the evidence.
>
> . . .
>
> Plaintiff's claim is that the defendant discriminated against him on the basis of his age when it terminated his employment. Under both the ADEA and the Massachusetts statute, it is unlawful for an employer to discharge any individual because of his age.
>
> . . .
>
> Now, the question, again, is: Has the plaintiff proved this his age had a determinative influence on defendant's decision to discharge him? . . . The test for liability, which if met by the plaintiff, requires a verdict in plaintiff's favor . . . is enunciated in a leading decision of the Supreme Court of the United States as follows: A disparate treatment claim . . . cannot succeed unless the employee's protected trait, in this instance his age, actually played a role in that process and had a determinative influence on the outcome.
>
> . . .
>
> In ADEA discrimination – now this is federal, mind you, I'm talking about the federal claim and the federal statute – plaintiffs bear the ultimate burden of proving that their age was the determinative factor in their discharge; that is, that they would not have been fired but for their age.

a determinative influence on defendant's decision to discharge him?" These instructions did not permit or suggest that the jury could predicate a finding of age discrimination on their disagreement with Airborne's business judgment. Similarly, we cannot agree that the instruction prevented the jury from focusing on the state of mind of the decisionmaker. The district court said:

> Here, the issue has to do with motive, state of mind. . . . [Y]ou're looking into the state of mind of the defendant company in discharging the plaintiff. It is a state of mind that existed or did not exist at the time of discharge.

These instructions adequately framed the only important question. Thus, we find no error in the decision of the district court not to give a business judgment instruction.[6]

Even if Airborne's argument prevailed under federal law, the damages awarded via ch. 151B would still stand. Airborne does not suggest that the failure to provide the business judgment instruction constitutes reversible error

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[6] Airborne's reliance on *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979), is misplaced. In *Loeb*, we endeavored to make clear that district courts had the flexibility to tailor instructions to meet the specific requirements of each case. *Id.* at 1017-19. We merely noted that, in assessing a employer's articulated nondiscriminatory reason for the disputed employment action, the jury must focus on the employer's motivation, not on its business judgment. *Id.* at 1012 & n.6. We did not suggest that a business judgment instruction is required in all age discrimination cases.

under Massachusetts law. Thus, the absence of the business judgment instruction has no effect on the defendant's liability under ch. 151B.

Airborne's third contention is that the district court's failure to include an "at-will" instruction and the "same actor inference" instruction provides a basis for vacating the jury's verdict.[7] Although a district court *may* be allowed to use these instructions in appropriate circumstances, *see Achor v. Riverside Golf Club*, 117 F.3d 339, 341 (7th Cir. 1997) ("[W]e doubt [the at-will instruction] should have been given, and we are confident that they should not have used . . . formal terminology."), *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995) (holding that *including* the "same actor inference" in a jury instruction does not constitute reversible error), we are confident that the absence of these instructions could not have confused or misled the jury as to the controlling law.

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[7] Airborne requested that the judge instruct the jury as follows:

> Plaintiff is an at-will employee who can be discharged at any time as long as the discharge is not because of a discriminatory reason.
>
> . . .
>
> When the individual who promotes a plaintiff is the same person who fires an employee, there is a strong inference that discrimination did not motivate the employment decision. You may, but are not required to, infer from this evidence that the decision to terminate Mr. Kelley's employment was not motivated by age.

Airborne claims a number of additional errors that warrant little discussion. The claim that Judge Garrity confused a wrongful discharge claim with Kelley's discrimination claim is without merit. The district court used the phrase "wrongful discharge" loosely at one or two points in the ten-day trial and twice in the jury instructions when discussing the calculations of damages, and there was some testimony that utilized the term. After reviewing the record as a whole, however, we discern no danger that the jury could have confused Kelley's ADEA and ch. 151B age discrimination claims with a contract-based wrongful discharge claim, *see, e.g., Upton v. JWP Businessland*, 682 N.E.2d 1357 (Mass. 1997). Nor was the district court required to define wrongful discharge when there was no contract-based claim. To do so might have confused the jury.

Airborne's objection to the district court's resort to an analogy to demonstrate the difference between state and federal pretext analyses also fails. To illustrate the meaning of pretext, the court used the example of a couple, in which one spouse tells the other spouse that he or she is going to the store to get milk, when in fact, he or she is going to buy cigarettes as well and wants to conceal this fact. Airborne's only objection to the analogy at trial was that it "created the impression" that, under state law, the jury's finding of pretext was sufficient to find intentional discrimination. As the jury's finding of pretext *was*, in fact, sufficient to enter judgment on the state claim, we fail to see how the analogy constitutes reversible error. We need not consider Airborne's other arguments, that the analogy shifted the burden of proof and placed the jury in the position of being a "super-personnel agency,"

because Airborne failed to raise these concerns before the district court. *See La Amiga del Pueblo, Inc. v. Robles*, 937 F.2d 689, 692 (1st Cir. 1991).

The instructions adequately explained the controlling discrimination law to the jury. We "customarily cede wide discretion to trial courts to fashion jury instructions as they see fit and we see no reason to second-guess the court in this instance." *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996) (citations omitted).

C. The District Court's Questioning of Witnesses

Airborne claims it suffered prejudice because the district court improperly commented on the evidence and interrogated the witnesses during the course of the trial. In particular, Airborne argues that the district court improperly trivialized Simpson's opinions regarding customer concerns and wrongfully criticized Guiod's business judgment. After reviewing the record, we conclude that Airborne failed to object properly to the district court's questions.

> "Federal Rule of Evidence 614(c) provides that objections to the interrogation of witnesses by the court may be made at the time of the interrogation or at the next available opportunity when the jury is not present. . . . If a party fails to object to the court's interrogation of a witness at trial, his objection will not be reviewed on appeal."

Stillman v. Norfolk & Western Ry. Co., 811 F.2d 834, 839 (4th Cir. 1987). In this case, Airborne's counsel did not object to the district judge's questioning of witnesses during the

trial, either in front of the jury or when the jury was not present. The district court has the undisputed right to question witnesses at trial, *see United States v. Henry*, ___ F.3d ___, 1998 WL 38009 (1st Cir. 1998), and proper objections are vital in order to assist the district court in ensuring that its participation is not unfairly prejudicial to one side. Thus, we will not review Airborne's claim that the district court's questions here constitute prejudicial error.

III.

Damages

Finally, Airborne challenges the $1,000,000 front pay award under the ADEA and ch. 151B. Airborne advances four arguments: (1) that the district court abused its discretion in finding that reinstatement was impracticable or impossible; (2) the front pay jury instruction was inadequate; (3) the evidence was insufficient to sustain the jury's award; and (4) the district court improperly multiplied the jury front pay award pursuant to ch. 151B, § 9. We disagree and affirm the front pay award.

A. Reinstatements

In his complaint, plaintiff's request for damages included a request for reinstatement or front pay.[8] On the first day of trial, the district court asked the defendant whether it could take a position on reinstating Kelley; the

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[8] The plaintiff explicitly refused to stipulate that it was not seeking reinstatement for fear of losing the right to front pay under the ADEA.

defendant declined. After the jury awarded $1,000,000 in front pay, Airborne filed a post-trial motion asking the district court to order Kelley reinstated. Airborne suggested that, because Kelley's RFSM position was filled, the district court could order that Kelley return to a specially created position of "at-large" RFSM, which it claimed offered compensation, benefits, and responsibilities similar to the position which Kelley had lost. Kelley would work for Simpson, his supervisor prior to his termination. Airborne reasoned that, because it was now "willing to reinstate Mr. Kelley as a result of the jury's finding that it acted wrongfully in terminating his employment, Mr. Kelley is not entitled to front pay."

The district court conducted two days of hearings on the legal and practical aspects of reinstatement, which included the receipt of additional testimony from Goodwin and a proffer from counsel describing the proposed position. The district court found that reinstatement was "impracticable in the extreme" and therefore awarded front pay under both the ADEA and ch. 151B, § 9.[9]

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[9] The district court couched his finding in the "impracticable or impossible" standard because the parties proceeded under the ADEA. To terminate an employee's eligibility for front pay damages accruing after a reinstatement offer under Massachusetts law, an employer must make an objectively reasonable offer of reinstatement, and the employee must reject that offer. *See Conway v. Electro Switch Corp.*, 523 N.E.2d 255, 258 (Mass. 1988); *Brady v. Nestor*, 496 N.E.2d 148, 151 (Mass. 1986)). Airborne does not seriously argue on appeal that its post-verdict motion seeking reinstatement terminated Kelley's right to the jury's award of front pay under ch. 151B. In fact, Airborne never made an offer to Kelley, in the sense of a legally binding offer that he could accept or reject. Rather, Airborne argued only

Airborne contends that the district court abused its discretion because (1) Kelley failed to show that his relationship with Simpson, his immediate superior, was hostile, (2) and that the trial court's findings were unsupported by the evidence. Under the ADEA, though the district court has equitable power to award front pay when plaintiff has "no reasonable prospect of obtaining comparable alternative employment," *Powers*, 915 F.2d at 42 (citation and quotation omitted), future damages should not be awarded unless reinstatement is impracticable or impossible. *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 615 (1st Cir. 1985). The district court has broad discretion to determine precisely how to compensate the injured plaintiff fully, *see Selgas v. American Airlines, Inc.*, 104 F.3d 9, 13 (1st Cir. 1997), and, given its ability to directly observe the litigants, it is in a far better position than an appeals court to judge the quality of their relationship, an important factor in determining the viability of reinstatement. *See Wildman*, 771 F.2d at 615. On appeal, an order denying reinstatement will be disturbed only when the reviewing court is left "with a definite and firm conviction that a mistake has been made." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1201 (7th Cir. 1989).

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that it was feasible for the court to order Kelley reinstated as an "at-large RFSM." Given the court's conclusion that reinstatement was impracticable, it follows logically that Airborne's [sic] never made an objectively reasonable offer. Kelley is thus entitled to the jury's front pay award under state law, notwithstanding Airborne's arguments respecting reinstatement under federal law.

The district court based its decision on the considerable antipathy Airborne's top management held for Kelley, antipathy that the district court found went beyond the "animosity engendered by th[e] litigation." As the district court explained, Brazier disliked Kelley prior to the litigation; the other management staff had effectively vilified Kelley, which completely undermined his value as a manager; and Kelley's supervisor would be the man who had signed his termination letter – a termination the court described as "deliberately manufactured" without restraint. Further, the district court did not trust Airborne's reinstatement offer or their intentions. The court described the motion asking the court to reinstate Kelley as "just another strategic move" and found that the proposed "at-large" position was indefinite and "make-work."

The district court thus expressed deep concerns in its determination that Kelley's reinstatement to Airborne was impracticable. Given these stated reasons, we find the refusal to order reinstatement well within the court's discretion and amply supported by the record. *See Maxfield v. Sinclair Intern.*, 766 F.2d 788, 795 (3d Cir. 1985) (noting that reinstatement may be inappropriate if animosity has damaged the relationship between the parties); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982) (similar).

B. The Front Pay Instruction

Airborne next contends that the district court incorrectly instructed the jury on how to calculate front pay damages. Within federal employment discrimination law,

front pay is generally an equitable remedy awarded by the court, *see Lussier v. Runyon*, 50 F.3d 1103, 1108 (1st Cir. 1995), while, under ch. 151B, the jury awards front pay, *see Handrahan*, 680 N.E.2d at 576. The district court thus submitted the issue of front pay to the jury. Airborne argues that, due to the district court's inadequate instructions on how the jury was to calculate front pay, the award should be vacated or, in the alternative, remanded for a further hearing.[10] We disagree.

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[10] The district court instructed the jury on front pay as follows:

> If the plaintiff was wrongfully discharged, and he's making roughly half as much now as he did when he was on the job, and because of his age and circumstances can't get that same type of salary, he is entitled to lost future earnings for as long as you conclude he would suffer damage in that respect. And still stating, I don't mean to overlook the defendant's arguments, that he shouldn't be entitled to any damages at all because they didn't discharge him for his age, and, also, that there's no indication that he would have worked that long, that's the defendant's view. . . .
>
> There is, and this is worth stating, an obligation in every case that a person seeking damages to, what they call, mitigate damages; that is, do his best to reduce the damages. And on that issue, there is no dispute in the evidence that plaintiff tried to get another job. He did get one . . . and then he went to work for . . . his father . . . and he's making $40,000 a year. But I did note, and you perhaps noted it as well, that in these computations about future lost earnings, it was assumed . . . that he was making $65,000, or was capable of making $65,000 instead of 40,000, the

"Our principal focus in reviewing jury instructions is to determine whether they tended to confuse or mislead the jury on the controlling issues." *Service Merchandise Co., Inc. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983). We look to state law governing the award of front pay damages to determine if the jury charge was proper. *See DaSilva v. American Brands, Inc.*, 845 F.2d 356, 362 (1st Cir. 1988). In Massachusetts, front pay is considered a form of compensatory prospective damages, akin to future damages in the tort context. *See Conway*, 523 N.E.2d at 256-57. Massachusetts law requires that front pay awards not be speculative, that they be causally related to the wrongdoing, and that the plaintiff not be made more than whole. *See id.* at 527.

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reason being he did get a job that lasted just a short time at the higher figure.

The touchstone and the big principle with reference to damages is that they have got to be reasonable. Damages must be reasonable and not speculative. You are not permitted to award speculative damages.

. . .

Damages must have been proximately caused by the wrongful discharge.

. . .

One principle that may be relevant on the question of the duration of the proper period of time in which to award lost future wages is the principle entitled finding as to a thing once proved to exist. You may find that a state of affairs, once proved to exist, continues as long as is usual with things of that nature, in the absence of evidence in the case which leads you to a different conclusion.

Airborne argues that the instruction was legally deficient because the district court failed to instruct the jury (1) to consider other relief that Kelley might recover and his prospects for obtaining comparable alternative employment and for continuing at Airborne in light of his health; (2) to consider whether his job would remain in existence given Airborne's economic future; and (3) to reduce front pay as much as necessary to keep Kelly from being overcompensated.[11] We disagree.

While some of Airborne's proposed instructions may have been useful, Massachusetts law does not suggest that the district court abused its discretion in not using Airborne's proffered instructions. What Massachusetts authority there is on front pay instructions indicates that the charge here was adequate. *See Boothby v. Texon*, 608 N.E.2d 1028, 1039 (Mass. 1993) (approving front pay instruction in wrongful discharge case that jury could use its "common sense" in formulating a front pay award); *Griffin v. General Motors Corp.*, 403 N.E.2d 402, 405 (Mass. 1980) (approving instruction that the "plaintiff was 'entitled to her past and future impaired earning capacity' ").

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[11] Airborne claims that "the maxim that the 'thing once proved to exist' instruction creates a presumption requiring the production of contrary evidence by the party opposing the inference" and that it invites the award of speculative damages. Before the district court, Airborne's *only* stated basis for its objection to the instruction was that the court, rather than the jury, should determine the proper number of years for a front pay award. This claim had no basis in Massachusetts law, *see Handrahan*, 680 N.E.2d at 576, and thus Airborne failed to suggest a proper cure, *see Linn*, 874 F.2d at 5.

The district court adequately described the controlling legal principles; thus, we find no abuse of discretion.

C. The Sufficiency of Evidence on Front Pay Damages

Airborne challenges the jury's $1,000,000 front pay award under ch. 151B, arguing that the award is speculative and not supported by record evidence.[12] In its post-trial motions, Airborne moved pursuant to Fed. R. Civ. P. 59 for remittitur of the front pay award and for a new trial. The district court denied both motions. The trial judge has "discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence," *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222 (1996) (citations and quotations omitted), or to order remittitur of the award in light of the evidence adduced at trial, *see Conde v. Starlight I, Inc.*, 103 F.3d 210, 212 (1st Cir. 1997). "[T]he role of the district court is to determine whether the jury's verdict is within the confines set by state law. . . . [We] then review the district court's determination under an abuse-of-discretion standard." *Browning-Ferris Ind., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

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[12] Airborne also challenges the district court's award of front pay pursuant to the ADEA. Front pay is an equitable remedy intended "to bring the plaintiff to the position which s/he would have occupied but for the illegal acts." *Selgas*, 104 F.3d at 12. Given Kelley's $100,000 salary and that he would probably never gain comparable employment because of his lack of education, we find no abuse of discretion in the district court's decision to award $1,000,000 in front pay.

We consider the damages evidence in the light most favorable to Kelley. *See Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 71 (1st Cir. 1995).

The proper front pay award was a hotly contested issue at trial and both sides introduced competent expert testimony on the issue. Plaintiff's expert estimated front pay damages to be $1,531,631 if Kelley worked at Airborne until age 60, $1,869,211 until age 62, and $2,377,482 until age 65. Airborne's expert calculated that Kelley would suffer $360,000 worth of front pay damage by age 55, but chose not to project beyond that age.

Airborne contends that we must vacate the jury verdict because Kelley presented no statistical evidence or other data that justified the expert testimony calculating Kelley's damages until age 60 and beyond. We disagree. "[A]n award of front pay, constituting as it does, an estimate of what a plaintiff might have earned had s/he been reinstated at the conclusion of trial, is necessarily speculative." *Selgas*, 104 F.3d at 14 n.6. Massachusetts law is clear that uncertainty in the award of future damages does not bar their recovery, and we have said that the " '[g]enerousness of a jury's award does not alone justify an appellate court in setting it aside' [unless] it is shown to exceed any rational appraisal or estimate of the damages. . . . " *Linn*, 874 F.2d at 6 (quoting *Kolb v. Goldring, Inc.*, 694 F.2d 869, 781 (1st Cir. 1982)).

There was sufficient evidence before the jury from which it could rationally have found $1,000,000 in front pay damage. Kelley intended to work at Airborne for the rest of his life; when Airborne fired Kelley, he was six years away from becoming fully vested in the company's

pension plan; and Airborne's stated retirement age was sixty-five.[13] Both experts agreed that, without a college education, it would have been extremely difficult for Kelley to obtain a comparable salary. In addition, the jury awarded only about two-thirds of the front-pay damages the plaintiff's expert calculated Kelley would suffer had he worked until he was sixty-years old. On these facts, the district court did not abuse its discretion in declining remittitur.

D. The Discretionary Multiplier

Airborne finally contends that the district court improperly imposed the discretionary multiplier contained in ch. 151B, § 9 on Kelley's front pay and emotional distress damages.[14] In the relevant part, the statute states:

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[13] As a disputed question of fact, Airborne was free to rebut plaintiff's evidence concerning his likelihood of remaining at Airborne with statistical evidence demonstrating that older workers, for whatever reason, were not likely to remain employed at Airborne. As Airborne notes in its brief, "such evidence would not have been unfairly difficult to obtain." The availability of statistical evidence that was not introduced by either party has no relevance to our limited inquiry: whether the evidence before the jury was sufficient to uphold the damage award.

[14] We note that Airborne does not argue that the district court abused its discretion in applying the multiplier based on the facts adduced at trial. We express no opinion regarding whether the application of the multiplier on these facts was appropriate. Our inquiry is limited only to a question of statutory interpretation: the meaning of the phrase "actual damages" in ch. 151B, § 9.

> Any person claiming to be aggrieved by a practice concerning age discrimination in employment . . . may bring an action under this section for damages or injunctive relief or both. . . . If the court finds for the petitioner, recovery shall be in the amount of *actual damages;* or up to three, but no less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four.

Mass. Gen. Laws ch. 151B, § 9 (emphasis added). After declining to order Kelley's reinstatement, the district court imposed a multiplier of 2.25 on the jury's award of back pay, front pay, and emotional distress damages in light of the jury's responses to the verdict form.

Airborne contends that settled principles of statutory construction and policy considerations indicate that emotional distress and front pay damages are not within the definition of actual damages subject to the discretionary multiplier. We disagree.

Airborne's first contention, that emotional distress damages are not actual damages, is incorrect. We note that in *Fontaine v. Ebtec Corp.*, 613 N.E.2d 881, 883 & n.4 (Mass. 1993), the Supreme Judicial Court affirmed without comment the multiplication of an award of emotional distress damages pursuant to § 9. In addition, Massachusetts courts award emotional distress damages routinely in age discrimination cases pursuant to ch. 151B, § 9. *See, e.g., Powers v. H.B. Smith Co., Inc.*, 679 N.E.2d 252, 257 (Mass. App. Ct. 1997).

Airborne's second contention, that front pay is not a type of actual damages, is a question that has not been explicitly answered in Massachusetts. The plain meaning of the language used in ch. 151B makes clear, however, that front pay comes within the ambit of actual damages. In 1989, the Massachusetts legislature authorized the recovery of punitive damages in discrimination cases successfully brought under the chapter by adding the following provision to the third paragraph of § 9: "If the court finds for the petitioner, it may award the petitioner *actual* and *punitive* damages." *Fontaine*, 613 N.E.2d at 887 & n.9 (emphasis added) (quoting St.1989, ch. 722, § 31). In 1990, the legislature amended the fourth paragraph of § 9 to provide for multiple damages specifically in cases of age discrimination by adding the following: "recovery shall be in the amount of *actual* damages; or up to three, but not less than two, times such amount if" the act was committed with knowledge that it violated the statute. *Id.* (quoting St.1990, ch. 395) (emphasis added). The phrase "actual damages" must have a consistent meaning throughout ch. 151B, and the provision appears to distinguish between actual damages and punitive damages in discrimination cases. In Massachusetts, front pay is compensatory in nature, not punitive. *See Handrahan*, 680 N.2d at 576. It thus follows that front pay must fall within the definition of actual damages subject to the discretionary multiplier. *Cf. DiMarzo v. American Mut. Ins. Co.*, 449 N.E.2d 1189, 1200 (Mass. 1983) (defining "actual damages" in Mass. Gen. Laws ch. 93A, to include "all losses which were the foreseeable consequences" of the unlawful conduct).

Airborne's reading of ch. 151B, § 9 is implausible. The fourth paragraph of § 9 authorizes the award of damages in discrimination cases by stating that "recovery shall be in the amount of *actual* damages. . . . " The provision contains no other authorization for the award of damages. Under Airborne's proffered definition, an age discrimination victim could *never* recover front pay because the loss of future pay would not be actual damage, and thus there would be no statutory basis on which to award it. The SJC, however, has explicitly held that § 9 authorizes the award of front pay. *See Conway*, 523 N.E.2d at 256-57. Therefore, front pay must be actual damages. The district court correctly found that the front pay award was subject to the discretionary multiplier.

IV.

For the reasons set forth above, the judgment of the district court is *affirmed*.[15] Costs to appellee.

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[15] Because the original opinion is this case was withdrawn, we followed the procedure outlined in *Gallagher v. Wilton Enter., Inc.*, 962 F.2d 120, 124 n.4 (1st Cir. 1992), and circulated the proposed panel opinion to all of the active judges of the court for pre-publication comment, none of whom objected to it. Nonetheless, it should be noted that this procedure neither converts this opinion into an en banc opinion nor precludes a subsequent request for rehearing en banc on any issue.

United States Court of Appeals
For the First Circuit

No. 96-2057

JOHN M. KELLEY,
Plaintiff – Appellee,

v.

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,
Defendant – Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr., *Senior U.S. District Judge*]

Before

Torruella, *Chief Judge*,

Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

James W. Nagle, with whom *Wilfred J. Benoit, Jr.*, *Anthony M. Feeherry* and *Goodwin, Procter & Hoar* LLP were on brief for appellant.

Stephen S. Ostrach and *Cynthia L. Amara*, New England Legal Foundation, on brief for Associated Industries of Massachusetts, amicus curiae.

David G. Hanrahan, with whom *Ross D. Ginsberg* and *Gilman, McLaughlin & Hanrahan*, LLP were on brief for appellee.

September 3, 1997

TORRUELLA, ***Chief Judge.*** John Michael Kelley ("Kelley") brought suit against Airborne Freight Corporation d/b/a Airborne Express ("Airborne") alleging violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* ("ADEA"), and its state law counterpart, Mass. Gen. Laws ch. 151B ("ch. 151B"). In April 1996, a jury returned a verdict in Kelley's favor, awarding back pay of $253,442.08, emotional distress damages of $250,000 under chapter 151B, section 9, and a $1,000,000 front pay award. On June 11, 1996, the district court ruled that reinstatement would be impracticable and ordered Airborne to pay the front pay award. The court also imposed a discretionary multiplier of 2.25 to back pay, front pay, and emotional distress damages under ch. 151B, § 9, and approved attorney's fees in Kelley's favor of $190,000.

Airborne filed three post-trial motions: a motion for judgment as a matter of law, a motion for a new trial, and a motion for remittitur. The first two motions were denied and the third was denied in part and granted in part – leading to a reduction in damages for emotional distress from $250,000 to $150,000. The final judgment was entered on August 14, 1996, in the amount of $3,136,858.

Airborne now claims a variety of errors requiring reversal and remand. The decisive issue for our purposes is the district court's failure to instruct the jury regarding the business judgment defense. We agree that this was

error compelling remand. We also take up some of the Airborne's other claims on appeal – in particular, a host of evidentiary issues – in order to provide guidance to the district court. Certain objections, however, need not be reached at this time and we leave them to be addressed on remand, at which time the trial court will be in a better position to rule on them than we are in today. These include objections relating to damages, front pay, reinstatement, and jury instructions.

I. Background

On appeal, we examine the facts, consistent with record support, in the light most favorable to the verdict-winner. *See Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 151 (1st Cir. 1990). We conclude that the jury could have found the following.

Airborne, which is engaged in the delivery of time sensitive packages is divided into two divisions – sales and field services. For all relevant times, the Executive Vice President for Field Services was Raymond T. Van Bruwaene ("Van Bruwaene"), who reported directly to Robert Brazier ("Brazier"), the President and Chief Operating officer of Airborne. The company also has a Human Resources Division, directed at all relevant times by Richard Goodwin ("Goodwin"). Van Bruwaene had three Area Vice Presidents working below him, including William Simpson ("Simpson"). Kelley was one of five Regional Field Services Managers ("RFSMs") working under Simpson. Kelley managed the Northeast Region, which consisted of the New England states and much of

New York. He took over the Northeast region in July 1987, at which time it was having significant problems.

In November 1988, Kelley and James Guiod ("Guiod"), the Regional Sales Manager for the Northeast Region, received a "Top Gun" award from Brazier. The award was for "superior performance in achieving the highest percentage increase in revenue and shipments for third quarter 1988 over the previous quarter." Letter from Brazier to Guiod and Kelley, dated November 10, 1988.

In June 1990, a performance review carried out by Simpson stated that "[t]he area's [sic] where there are problems are over shadowing the better area's [sic]." The review rated Kelley as outstanding in the areas of productivity, profits, and staffing and development, but rated him poorly in service performance, cost control, and progress toward improvement and leadership /management skills. In the leadership/management skills category, the report stated that Kelley had displayed a sexist attitude, had sexual harassment complaints filed against him, and made sexual comments and jokes around employees.

Kelley testified that the evaluation was the first time he heard about the sexual harassment complaint and that upon learning of the complaint he spoke with Simpson and denied the allegation. Kelley testified that Simpson told him "if nothing like this is alleged within the next six months to the next review period, that he would do everything within his power to insure that it's expunged from my record." Joint App. at 621.

In November 1990, Simpson evaluated Kelley's performance again, noting that "there has been remarkable

progress made in the Northeast Region toward all areas of your responsibility." Performance Appraisal for John M. Kelley, dated November 28, 1990.

In April 1991, Kelley received a ribald e-mail from one of his District Field Service Managers regarding a complaint by several male employees who had asked to be allowed to use the women's restroom at the Buffalo facility. Kelley forwarded the message to other managers and executives in an apparent attempt at humor. In reaction, Simpson admonished Kelley for his poor judgment.

Another performance review was conducted in October 1991. In that review, Simpson gave Kelley a "superior" overall rating. During the year prior to this review, Kelley and Guiod received two more "Top Gun" awards. Kelley's performance review in December 1992 was also positive. The evaluation stated that "service is at an all time high in the region." John M. Kelley Performance Appraisal, December 7, 1992. Both Van Bruwaene and Goodwin testified that if a person was to be discharged within ninety days, one would expect to see some indication in the performance reviews.

During this period, Airborne received complaints from some of Kelley's customers. Simpson testified that Kelley's failure to respond to customer needs was a recurring problem. For example, one problem occurred shortly after the December 1992 evaluation. Kelley's brother-in-law, Robert Cox, was the District Manager for the Region's North Shore Station. Cox's station had performed poorly for some time. In one incident, contrary to instructions Simpson had given to all RFSMs, including Kelley, no supervisor had accompanied the Airborne

driver for the first seven days that pickups were made for a new major national customer. There were problems with the pickups and the customer stopped using Airborne as a result.

In the summer of 1992, Simpson, Goodwin, Van Bruwaene, Kelley and others attended a meeting regarding a reduction in force ("RIF"). At that meeting, Goodwin stated that age would be a criteria in the RIF decisions, and Simpson commented that it would be an opportunity to get rid of some of the older, mediocre managers.

The decision to terminate Kelley was made by Simpson. Goodwin agreed to help write a termination letter on March 12, 1993. The letter was delivered to Kelley on March 24, 1993.

II. Business Judgment

Airborne argues that the court erred in failing to provide the jury with a business judgment instruction.

Under the familiar standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), an ADEA plaintiff must first establish a prima facie case of discrimination. Once this is done, the burden of production shifts to the defendant, who must offer a non-discriminatory reason for its actions. Once a non-discriminatory motive has been offered, the burden-shifting effect of the prima facie case is dispelled and the plaintiff must prove that the articulated reasons are pretextual. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981);

Menard v. First Sec. Services Corp., 848 F.2d 281, 287 (1st Cir. 1988).

When assessing a plaintiff's claim of pretext, we have stated that the jury should focus on the motivation of the employer, and not its business judgment.

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and non-discriminatory, but does not have to be a reason that the judge or jurors would act on or approve. . . . An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination. The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reasons, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment.

Loeb v. Textron, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979); *see also Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1114 (1st Cir. 1989) ("[W]e are reminded that in this Circuit [the employer's] motivation in firing [the employee], not his business judgment, are [sic] at issue."); *Menard* 848 F.2d at 287 ("The issue in this ADEA action, however, is not whether [the employer] made a wise decision. . . . The issue is whether First Security fired Menard because of

his age."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986) ("It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move."). We have also stated, albeit in dicta, that "the court should . . . explain [to the jury] that an employer is entitled to make its own subjective business judgments, however misguided they may appear to the jury, and to fire an employee for any reason that is not discriminatory." *Loeb*, 600 F.2d at 1019.

At least one of our sister circuits requires that the trial judge give a business judgment instruction when requested by the defendant. *See Stemmons v. Missouri Dep't of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996) ("[T]he district court must offer [a business judgment instruction] whenever it is proffered by the defendant."); *Walker v. AT&T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993) (the trial court has the obligation to give an appropriate instruction on business judgment, though not with the exact wording of the proposed instruction).

The instruction sought by Airborne is, in part:

> Mr. Kelly [sic] must show more than that Airborne made an unwise business decision, an unnecessary personnel move, or acted arbitrarily. The law does not stop Airborne from discharging an employee for any reason (fair or unfair) or for no reason at all, so long as the reason to discharge him does not stem from his age. Good faith errors in an employees [sic] business judgment are not, standing alone, evidence of age discrimination.

Defendant's Request for Jury Instructions, at 6. The request for a business judgment instruction was renewed after the jury was charged without such an instruction.

The instructions given by the court include neither the instruction requested by the defendant nor any equivalent instruction. To meet the requirements of *Loeb*, it must be clear to the jury that it is the employer's motivation, rather than its business judgment, that is at issue. We find, therefore, that the district court erred in failing to give a business judgment instruction in this case. We add that, in order to satisfy the requirement of a business judgment instruction, it is not necessary to give the precise instruction sought by the defendant in this case. The language from *Loeb*, quoted above, for example, would suffice for a business judgment instruction.

Nor can this error be dismissed as harmless. The jury was presented with considerable evidence of conduct by Airborne that might be considered unfair, but that does not suggest discrimination on the basis of age. For example, there was evidence that Kelley was fired only four months after a superior evaluation, that he had been employed for nineteen years, and that he was fired without progressive discipline. Furthermore, the evidence of age discrimination was indirect and far from overwhelming. In such a situation, failure to give a business judgment instruction cannot be termed harmless error. *Stemmons*, 82 F.3d at 821.

The error is not saved by the fact that the jury expressly found age to be a determinative factor in the decision to discharge Kelley. Such a finding was necessarily predicated on a determination that Airborne's

stated reasons for discharging Kelley were pretextual – a finding that may have been affected by the failure to give a business judgment instruction.[1]

We find, therefore, that the trial court's failure to give a business judgment instruction was reversible error.

III. Evidentiary Claims

Appellant presents myriad evidentiary claims, which we review in order to give guidance to the district court on remand. We review evidentiary questions for abuse of discretion. *See Cohen v. Brown University*, 101 F.3d 155, 168 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997).

Among the evidentiary challenges are attacks upon several rulings that excluded evidence on hearsay

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[1] Appellee cites *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 204 (1st Cir. 1987), in support of his claim that the jury's finding of age discrimination demonstrates that it did not base its verdict on its evaluation of Airborne's business judgment. In *Rowlett*, however, the court did issue a business judgment instruction. The claim on appeal was that the instructions confused the jury and thereby took its attention away from the issue – intentional race discrimination. Under those circumstances, we found that an express finding of purposeful racial discrimination demonstrated that the jury had not been so confused as to rule based on an incorrect standard. The instant case is quite different. The failure to give a business judgment instruction may have altered the jury's evaluation of Airborne's stated reasons for firing Kelley, thereby making a finding of age discrimination more likely. The jury's conclusion that age discrimination was present does not contradict the claim that the jury may have substituted its own business judgment in place of Airborne's.

grounds. These items included customer complaints received by Simpson, Brazier, and Guiod, as well as district sales manager complaints received by Simpson.[2] Kelley argues that these statements were properly excluded as hearsay. Airborne responds that these statements were admissible because they were offered to show Simpson's state of mind, and not to show the truth of the matter asserted. That is, Airborne argues that the complaints were relevant to demonstrate that Simpson and Guiod were aware of the complaints when they decided to fire Kelley. Although it is conceivable that the evidence was for a purpose other than the truth of the matter, and Airborne's argument is, therefore, plausible, Airborne must show more in order to overcome our deferent [sic] standard of review. This, it has failed to do. Airborne has offered no convincing evidence that the ruling went beyond the considerable discretion afforded the district court. Accordingly, we find no abuse of discretion.

Appellant next objects to the introduction of certain e-mail reports sent by Guiod to Simpson (the "leading edge reports"). These were ruled inadmissible under Federal Rule of Evidence 403. We again review for abuse of discretion. "Only rarely – and in extraordinarily compelling circumstances – will [this court], from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman v. Package Machinery*

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[2] Appellee argues that appellant's claims on this evidence were not preserved. We need not resolve the issue, however, because regardless of how we would rule on it, appellant cannot prevail on the merits of its claims.

Co., 865 F.2d 1331, 1340 (1st Cir. 1988). The reports contained information regarding service failures on certain accounts in Kelley's region. Concluding that the reports were "too clear an opportunity for Guiod to bury Kelley," Joint App. at 1612, the district court excluded the reports. We have no serious doubt that these reports would have prejudiced Kelley. The reports indicated problems in the region that the jury would likely attribute to Kelley. To the extent that the reports reflected mismanagement by Kelley, they were probative of a non-pretextual reason for his dismissal. There is some doubt, however, as to the accuracy of the reports. Moreover, their relevance is undercut by the lack of certainty as to whether Simpson ever read them prior to the dismissal. The question, therefore, involved balancing the probativeness of these reports against the risk that the jury would conclude that the reports explained Kelley's dismissal and would not adequately consider the possibility of discrimination. Such questions are squarely within the province of the trial court, and we see nothing in the record or the briefs on appeal to indicate that the court abused its discretion.

We reach a similar conclusion regarding the admission of Airborne's Employee Relations Guidelines for Disciplinary Action. Their admission was within the trial court's discretion. Kelley sought the admission of the guidelines in order to demonstrate that Airborne had not followed its own disciplinary procedures. Airborne argues that the guidelines are prejudicial because they suggest a contract to which they must adhere. The failure to follow standard procedures may be relevant to the pretext question and, therefore, we defer to the district

court's judgment regarding the relevance and usefulness of admitting the guidelines. Although there may be some validity to Airborne's view, we do not find the admission of the guidelines to rise to the level of abuse of discretion.

Airborne also makes a related claim that it should have been allowed to present testimony regarding the applicability of these guidelines to Kelley. More precisely, Airborne suggests that the guidelines often were not followed, and that it should have been allowed to present testimony to this effect. We disagree. The district court prevented Airborne from introducing evidence regarding the failure to follow the guidelines in cases involving employees who were not similarly situated to Kelley. As Judge Garrity explained, "[t]he only issue is whether [the guidelines] were applicable to [Kelley]. So, if you want to talk about the applicability of the guidelines to regional managers, that's one thing; but when you start talking about employees to whom there's no issue, I think it's time not properly spent." Joint App. at 956-57. As this quote indicates, Airborned [sic] was free to introduce evidence as to the use of guidelines in cases involving similarly situated managers. Our review of the record, therefore, reveals no abuse of discretion on the part of the district court.

Airborne next objects to the admission of evidence regarding age-based comments made in the summer of 1992. During a meeting regarding a reduction in force, Goodwin stated that age would be one of the factors considered in selecting employees for termination. Simpson commented that it "was a good time to get rid of some of the older, mediocre managers." Joint App. at 782. Airborne argues that these comments should have been

excluded under Federal Rule of Evidence 403 on the grounds that the probative value was outweighed by the prejudicial effect. Airborne argues that the statements were temporally remote, that the statements were not directed toward Kelley, and that Goodwin did not participate in the decision to terminate Kelley.

This court addressed a similar question in *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987). In that case, we upheld the admission of sex-based comments in a sex discrimination case, even though the speakers played no role in the decision to termination of the plaintiff and the comments were made long before plaintiff left the company.[3] We concluded that "evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment." *Id.* at 597. As in *Conway*, we are aware that "the relationship between the evidence offered . . . and the alleged discriminatory employment actions might [], in some cases, be too attenuated to support a trial judge's finding that such evidence is irrelevant." *Id.* at 598. The evidence here, however, had a direct bearing on the age discrimination issue and one of the speakers was the person who decided to fire Kelley. Thus, we find no abuse of discretion.

Airborne also appears to challenge the exclusion of testimony regarding sexist remarks made by Kelley on

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[3] One comment was made eight months prior to the departure of the plaintiff and the other was made ten to twenty-two months before she left.

the grounds that the company was not aware of such remarks at the time Kelley was fired. It is established that "an employer cannot avoid liability in a discrimination case by exploiting a weakness in an employee's credentials or performance that was not known to the employer at the time of the adverse judgment." *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996). Airborne also makes the related claim that Kelley's former secretary, Audrey Kivley, should not have been able to testify to the effect that Kelley was a "perfect gentlemen [sic]." Although Airborne was not allowed to present evidence regarding certain allegedly sexist behavior, there was evidence that which [sic] the jury might have interpreted as signs of a sexist attitude. For example, Simpson testified that Kelley threw an object down the front of a woman's dress during a recruiting trip. It was within the court's discretion to allow Kivley to testify in order to rebut such evidence.

Airborne's final evidentiary claim is that the trial court erred in admitting two e-mails sent by Van Bruwaene to Goodwin, speculating that Kelley's discharge could "end up a messy termination." Joint App. at 2371. Airborne concedes that, although it raised this issue in its motion in limine, it failed to raise a contemporaneous objection. Under these circumstances, we review only for plain error. *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1336 (1st Cir. 1988). We reverse only if there was error that "resulted in a miscarriage of justice or seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 189 (1st Cir.) (quotation marks omitted), *cert. denied*, ___U.S.___, 117 S. Ct.

294 (1996). The plain error standard affords reversal "only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice." *United States v. Griffin*, 818 F.2d 97, 100 (1st Cir. 1987).

Even if there was error here, it does not rise to the level of plain error. The admission of these e-mails is not "so shocking that [it] seriously affect[ed] the fundamental fairness and basic integrity of the proceedings below."

IV. Conclusion

For the reasons stated herein, we ***reverse*** the district court verdict and ***remand*** to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2057

JOHN M. KELLEY,

Plaintiff-Appellee.

v.

AIRBORNE FREIGHT CORPORATION D/B/A AIRBORNE EXPRESS,

Defendant-Appellant.

BEFORE

TORRUELLA, Chief Judge,
BOWNES, Senior Circuit Judge,
SELYA, BOUDIN, STAHL AND LYNCH, Circuit Judges.

ORDER OF COURT

Entered: May 20, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

PHOEBE D. MORSE, CLERK

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Nagle, Ostrach and Hanrahan]

(2)

No. 98-302

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

October Term, 1997

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,
Petitioner,

v.

JOHN M. KELLEY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to determine whether, under the facts of this age discrimination case, the absence of a business judgment instruction constituted prejudicial error under federal law where the First Circuit correctly recognized that the judgment would stand on independent state law grounds regardless of the answer to that inquiry?

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OPINIONS BELOW

The opinion in this case is reported at 140 F.3d 335 (1st Cir. 1998). A previous opinion of the First Circuit was withdrawn in accordance with Internal Operating Procedure ("IOP") X.D of the First Circuit upon consideration of the Respondent's Suggestion for Rehearing En Banc.

STATUTES INVOLVED

Judgment in this matter was entered pursuant to the ADEA and Massachusetts General Laws Chapter 151B. Airborne recognizes that the judgment at issue is in the amount of $3,136,858 which is the judgment that was entered pursuant to the state statute.

M.G.L. c. 151B, § 4

It shall be an unlawful practice:

> 1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

INTRODUCTION

The question presented in Airborne's Petition is not raised by the decision or the record below. Airborne raises the question of whether a business judgment instruction is always necessary in a case brought pursuant to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* However, the judgment at issue was entered

pursuant to Massachusetts General Laws Chapter 151B thereby rendering immaterial questions pertaining to the ADEA judgment.

As detailed below, there is no cause for this Court to review whether the Massachusetts statute requires that such an instruction be given. *See, pp.* 14-16, *infra.* The contention was rejected by the District Court and by a unanimous decision of a panel of the First Circuit. Moreover, the panel circulated the opinion to the other judges of the First Circuit "for pre-publication comment, none of whom objected to it." 48A, n. 15.[1] Thereafter, Airborne filed a Suggestion for Rehearing En Banc which was denied. 65A.

Even if this case did not stand on independent state law grounds, certiorari would be unwarranted. There does not exist an intolerable conflict among the circuits which have considered whether the absence of a business judgment instruction constitutes reversible error. All circuits that have considered the issue agree that the absence of a business judgment instruction does not require reversal and that courts must examine the facts of each particular case. *See, pp.* 16-19, *infra.*

STATEMENT OF THE CASE

Airborne has greatly misstated the facts of this case. Consequently, Kelley is forced to correct these misrepresentations herein. Supreme Court Rule 15. However, Airborne's petition should be denied without regard to these factual disputes because the judgment which Kelley seeks to collect was entered pursuant to Massachusetts state law.

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[1] Citations to the Joint Appendix filed with the First Circuit appear herein as "A. ___." Citations to Airborne's Petition appear herein as "P. ___." Citations to the Appendix to Airborne's Petition appear herein as "___ A."

A. Airborne Misrepresents the Statute at Issue in this Proceeding.

Airborne recognizes that the judgment at issue is a "multi-million dollar" jury verdict in the amount of $3,136,858. P. 2, 7. That judgment was entered pursuant to the Massachusetts statute on Count II of the complaint. 2A. A separate judgment under Count I of the complaint was entered on the ADEA claim in a lesser amount ($1,244,152) due to the significant differences in the remedial provisions of the ADEA and M.G.L. c. 151B and the way in which the two statutes are interpreted. 2A. Nevertheless, Airborne does not make even a passing reference to M.G.L. C. 151B in the section of its Petition entitled "Statutes Involved." P. 1-2.

The reason for the omission is clear. Since the judgment at issue was entered pursuant to Massachusetts law, Airborne's professed concerns about the judgment entered pursuant to the ADEA are immaterial and the question presented by Airborne is not raised by this case.

B. Airborne Misrepresents that There Was Uncontradicted Evidence that Guiod and Kelley "Hated Each Others' Guts."

As set forth below, Airborne's truncated summary of the evidence is a gross distortion of the presentation of Kelley's case and Airborne's defense. For instance, while the termination letter given to Kelley listed a multitude of reasons for terminating Kelley, all of which Airborne attempted to support at trial, Airborne refers to only one reason for discharging Kelley in its Petition -- Kelley's alleged inability to work cooperatively with the sales arm of Airborne

and, in particular, James Guiod, Kelley's counterpart on the sales side of the business.[2]

In its Petition, Airborne argues that "the uncontradicted evidence at trial established that Guiod and Kelley 'hated each others' guts.'" P. 4. This statement is a misrepresentation on multiple levels. First, the quotation set forth (i.e. "hated each others' guts") does not even appear in the record. The exhibit cited by Airborne was an E-Mail from Raymond Van Bruwaene, Executive Vice President of Field Services, in which he wrote not that Guiod and Kelley hated each others' guts but rather that "Guiod hates Kelley's guts..." A. 2315.

In addition to being inaccurately quoted, the statement was not "uncontradicted." Guiod, himself, stated: "I did not hate Mike Kelley . . ." A. 1617. Van Bruwaene also contradicted what Airborne erroneously referred to as the "uncontradicted" fact. Van Bruwaene testified that "I shouldn't have said it, because I did not know it for a fact, if Mr. Guiod hated Mr. Kelley's guts." A. 1065.

As will be set forth below, the unreliability of Airborne's Petition, evidenced by the foregoing misrepresentations, has placed a heavy burden on Kelley to set the record straight.[3]

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[2] Despite this alleged inability to work cooperatively, Kelley and Guiod won four "Top Gun" awards together -- more than any other sales/service team in the company. A. 2189-92.

[3] Airborne has made other misrepresentations which are innocuous but prove that Airborne has not taken seriously its responsibility to portray the record accurately. For instance, Airborne states: "At the time he was terminated by Airborne, Kelley was one of five Regional Field Services Managers ("RFSM"). P. 3. In fact, Kelley was one of thirteen RFSMs. A. 1079. He was one of five RFSMs reporting directly to William Simpson, Vice President of Field Services for Area 1.

C. The Petitioner Misrepresents Kelley's Case Presentation and the Record.

1. Kelley's Presentation of the Case

Kelley was the Northeast Regional Field Services Manager ("RFSM") for Airborne and answered directly to William Simpson who was an Area Vice President. Simpson supervised four other RFSMs in addition to Kelley. In December, 1992, Kelley was given the *highest rating* of any RFSM working under Simpson. A. 948. The rating was not merely subjective. Airborne kept many types of statistics to measure the performance of people in Kelley's position. Kelley had outperformed the other RFSMs in Simpson's area in these measured statistics which included so-called "Quality of Service" audits. A. 2205. In the December, 1992 performance review, Simpson wrote: ". . .Service is at an all time high in the region." A. 1439; 2148. Simpson's comments appeared in the section of the appraisal form where Richard Goodwin, Vice President of Human Resources, testified that he would have expected to see an indication that Kelley would be terminated in ninety days.[4] A. 1155.

In March, 1993, Kelley spoke with Simpson about the possibility of being promoted to Vice President. A.657. On March 24, 1993, Simpson delivered a termination letter to Kelley discharging him from his employment purportedly for

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[4] Airborne also misrepresents the history of Kelley's performance. Airborne argues that it "presented evidence that Kelley's performance had been inconsistent during the previous several years." P. 4 In fact, Airborne had also rated Kelley as a superior employee in 1991 and although he was criticized at the beginning of 1990, by the end of the year, Simpson reported that Kelley's region had made "remarkable progress" in all areas. Thus, for more than two years prior to his discharge in March, 1993, Kelley's performance had been consistently superior. A. 2139; 2140-42.

a broad ranging list of inadequacies in his performance -- none of which appeared in his glowing evaluation from only three months earlier. A. 660-61; 2125-26.

In its Petition, Airborne misrepresents that the sole reason advanced by Airborne for Kelley's discharge was a breakdown in his relationship with sales caused by customer complaints.[5] The termination letter listed a multitude of other purported deficiencies in Kelley's performance which were easily dismissed as outright lies and which Airborne deliberately does not bring to the attention of this Court.

For example, in the termination letter Simpson assailed Kelley for procrastinating in following instructions, for not enforcing company sexual harassment policies, and for management judgments which were allegedly so bad that an anonymous letter about Kelley had been written to the President of Airborne. Simpson also assailed Kelley for being "bullish." A. 2125-26.

The reasons given for the discharge in the termination letter were outright lies. Simpson admitted that sexual harassment was not an issue in Kelley's region. A. 1262. Moreover, Simpson knew prior to the decision to discharge Kelley was made that the allegations in the so-called "anonymous letter" had no merit because he sent a retired FBI agent to conduct an investigation and the FBI agent reported that the allegations contained in the *anonymous* letter were groundless. A. 1473.

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[5] Airborne argues that it "explained" to the jury that in March, 1993, Simpson reached the conclusion that the relationship between sales and service was irreparable. P. 4. The explanation was given by Simpson. Of course, the jury did not have to credit Simpson's explanation and there was good reason to suspect that Simpson was lying. The District Court noted, in a post-trial hearing, that "Mr. Simpson and Mr. Goodwin [tried] to portray to the jury a scenario simply contrary to fact." A. 2076.

In attempting to convince the jury that customers were outraged at Kelley's performance, Airborne witnesses repeatedly referred to the Thomas Cook Travel Agency account as the example of Kelley's purported inability to service customers. As with so many other "facts" asserted by Airborne at trial and in its brief, Airborne's own internal E-mail communications undermined its witnesses' testimony about the Thomas Cook account. The E-Mail, written by Simpson, disclosed that the Thomas Cook account was experiencing problems which threatened the relationship between Airborne and Thomas Cook. The problems were concentrated in five geographic areas -- none of which were in Kelley's region. A. 1394-95; 2255.

In the termination letter, Simpson assailed Kelley for customer problems and poor relationship with the sales side of the business for the entire period of his tenure as RFSM of the Northeast Region which dated back six years. Nevertheless, Kelley had received superior performance ratings in his last two annual reviews and was not chastised for poor relationship with sales and/or customers in either. A. 2140-42; 2146-48.

Over ten days of trial Airborne's witnesses repeatedly lied. It is impractical to recite here the scenarios in which it was apparent that Airborne's witnesses were lying about the reasons for Kelley's discharge. However, the words of the experienced District Court Judge who presided over the case, made in connection with a post-trial hearing, prove the point:

> . . . I believe that the scenario for discharging the plaintiff was deliberate, false, contrived and concealed from the jury and the Court. I found the testimony of the officers who came on here from Seattle to be, generally speaking, on key points, lacking in credibility . . . Time and time again, I found the statements of the principal witnesses for the defendants to be

> contrary to -- contrary not only to other reliable evidence, but approaching contrary to common sense . . . A. 1965-1966.

The District Court also stated in post-trial hearings that Airborne's description of events was "absolutely unreliable," A. 2074, and "contrived." A. 2078.

The District Court was not alone in its assessment of Airborne's lack of candor. After carefully reviewing the 2,500 page record, the First Circuit wrote:

> In short, Airborne's witnesses proffered a version of events that often seemed in conflict with other evidence adduced at trial, and they contradicted each other in attempting to explain Kelley's dismissal. 14A.

Kelley presented evidence which had a direct bearing on the issue of age discrimination. In particular, Kelley testified that the decision maker, Simpson, stated approximately nine months prior to Kelley's discharge that a proposed reduction in force presented "an excellent opportunity to get rid of some of the older mediocre managers." A. 782. In addition, Kelley testified that the Vice President of Human Resources, Richard Goodwin, stated that age would be one factor considered in deciding who to terminate. A. 781. The oldest person in Kelley's region was terminated as a result of

the reduction in force. He was in his mid to late forties.[6] A. 782.

Airborne argues that this evidence was uncorroborated. Because Airborne's witnesses obviously lied throughout the trial, it is inappropriate for Airborne to continue to argue the evidence in a light most favorable to itself -- leaving aside that such arguments also flaunt well-settled principles of appellate review of jury verdicts. Moreover, Airborne did not even dare to ask Van Bruwaene whether the discriminatory statements were made despite the fact that he was present at the meeting where they were uttered. A. 780.

Kelley also presented unrebutted evidence that while his request to be elevated to Vice President was met with a letter of discharge, Jack Bunyan, another RFSM working under Simpson, whose statistical ratings had been inferior to Kelley's, was promoted to Vice President after Kelley's discharge. A. 635; 657; 1178; 2193; 2194-2195; 2276. Bunyan was in his thirties at the time.[7] A. 1178. In addition, Kelley's replacement was in his thirties. A. 232.

Among other evidence relative to Airborne's state of mind, Kelley introduced into evidence, without objection, an E-Mail relating to Kelley's prospective termination in which Van Bruwaene stated "hopefully we have enough data to

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[6] Airborne also misrepresents the First Circuit's finding regarding evidence which directly indicated age bias. The First Circuit held that the evidence of discriminatory statements made by Simpson "had a direct bearing on age discrimination because Simpson made the decision to terminate Kelley." The First Circuit also held that since Goodwin was in charge of the company's discrimination policy and "participated closely" in Kelley's termination, his comments evidenced a discriminatory atmosphere. 23A.

[7] This fact undermines Airborne's misrepresentation that there was no evidence that similarly situated management employees were treated differently from Kelley.

avoid a wrongful discharge," A. 2315, which Van Bruwaene testified encompassed age discrimination. A. 1144.

This evidence was sufficient to support the jury's express answer to a special interrogatory that age was a determinative factor in the decision to discharge Kelley. In fact, in its Reply Brief filed at the First Circuit, Airborne admitted that the evidence was sufficient to support the verdict which, of course, includes the jury's specific "age" finding. *Airborne's Reply Brief* at 2, n. 1 ("Airborne is not arguing sufficiency of the evidence").

Airborne has recast Kelley's evidence, presented over the course of a ten day trial, and reduced its version of Kelley's evidence to a solitary paragraph in its Petition. Airborne argues in that paragraph that Kelley's "presentation to the jury emphasized . . . that Airborne had not followed its progressive disciplinary guidelines to address his performance problems during the winter of 1993, and that he had not been warned that his job was in jeopardy." P. 3. Kelley did not emphasize either of these points. In fact, neither point was even raised in Kelley's closing argument.

In addition to evidence of age bias, Kelley's presentation consisted of demonstrating that his performance remained excellent in 1993 and that Airborne simply made up reasons for the discharge to disguise the real discriminatory motive. Progressive discipline or even a warning was unnecessary because the true reason for Kelley's discharge was his age -- an attribute which could not be altered through progressive discipline.

2. Airborne Misrepresents Kelley's Closing Argument.

Airborne misrepresents Kelley's closing argument. Airborne states that "Kelley's counsel argued to the jury that [Kelley's] termination was 'wrongful' and 'messy'." P. 3. In actuality, Kelley's counsel merely reminded the jury about

what Van Bruwaene had written prophetically about Kelley's termination in two E-Mail messages which were admitted into evidence without objection. A.1056; 1895; 2315; 2371. Airborne likewise takes other isolated words and phrases out of context to attempt to create the impression that Kelley's counsel did not argue in accordance with the District Court's age discrimination instructions. That charge simply is not true.

Kelley's counsel remained true to age discrimination concepts. He argued that the multitude of reasons for the termination concocted by Goodwin and Simpson were obvious pretext. He reminded the jury of the various ways in which Airborne's executives were exposed as liars. Kelley's counsel concurrently reminded the jury about the evidence of age discrimination including the discriminatory statements made by Simpson and Goodwin in connection with the reduction in force, the fact that the oldest person in Kelley's district (mid to late forties) was terminated as a result of the reduction in force, and the fact that Kelley was replaced by a person in his thirties. Kelley's counsel reminded the jury that "this is an age discrimination case," A. 1868, that "we're talking about age here," A. 1878, and asked the jury to tell Airborne that "there was discrimination as a determining factor in the case." A. 1895.

Airborne also omits to mention that Kelley's counsel warned the jury that no matter what he said, "what the judge tells you the law is, you have to abide by." A. 1867.

3. Airborne Misrepresents the District Court's Questioning of Witnesses.

Over the course of the ten day trial, the District Court occasionally made inquiries of witnesses for both the plaintiff and defendant. Airborne never objected at trial to the District Court's questioning, either in the presence of the jury or at some later point. Airborne did not raise the issue of the

District Court's questioning of witnesses in its post-trial motions.

On appeal, Airborne argued for the first time that the District Court's questioning suggested that Airborne's business judgment could be second-guessed. In an unfair ambush on the District Court, Airborne took a series of questions asked by the District Court out of context and cut and pasted the colloquy together in a way that it hoped would support its argument since the actual record did not. Airborne even argued that the District Court "refused" to allow the witness to have the last word. In fact, the witness not only had the last word but agreed with the District Court. A. 1351-53. Airborne employed the same technique with another question asked by the District Court.

In its Petition, Airborne has further reduced the District Court's colloquy with the witness thereby placing it even further out of context. Footnote three of the Petition is a gross mischaracterization of the District Court's questioning of the witness and the significance of that questioning in the context of the ten day trial. The District Court never suggested that the jury was free to base liability on disagreement with Airborne's business judgment. To the contrary, the District Court emphasized to the jury that Airborne was free to discharge Kelley for any reason at all so long as it was not discriminatory -- a fact which Airborne conspicuously omits to bring to the attention of this Court. A. 1183-1184.

4. The Petitioner Misrepresents the Nature of the Jury Verdict.

The jury was given special interrogatories to answer but Airborne does not advise the Court of that important fact. The jury was asked whether age was a determinative influence in the decision to discharge Kelley. A. 268. It answered that question affirmatively. A. 268. Although the jury was given a special interrogatory which permitted it to render a

verdict for Kelley on pretext alone if Kelley had not convinced the jurors that the ultimate motive for the discharge was his age (as permitted by Massachusetts law), the jury did not do so. It actually found "discriminatory animus." 26A, n. 2.

Since the jury based its verdict on evidence of age animus, Airborne's argument that the verdict was based on pretext is flatly wrong. The First Circuit recognized this fact when it wrote:

> Here, the jury affirmatively responded on the jury verdict form that age had a determinative influence on Airborne's decision to terminate Kelley and thus did not premise its liability on a finding of pretext alone. 26A, n.2.

Unable to explain the contradiction between the jury's express finding and its argument, Airborne simply chose to ignore the answer to special interrogatories in its Petition.

5. Airborne Misrepresents Kelley's Suggestion for Rehearing En Banc and the First Circuit's Holding.

Airborne argues that Kelley's Suggestion for Rehearing En Banc raised arguments that "were novel and contradictory to Kelley's previous positions as stated in his initial briefs (sic)." P. 9, n. 5. This statement is false. Upon reviewing the original opinion in this case, it was clear to counsel that the First Circuit had been misled by the misrepresentations of the record made by Airborne. Kelley pointed out the errors in the opinion and argued, *inter alia*, that the First Circuit had not reviewed the record as a whole to determine whether the business judgment instruction would have made a difference in light of the evidence, the jury instructions, and the answer to the special interrogatories.

Kelley asserted that the failure to do so violated his Seventh Amendment right to a jury determination.

The First Circuit spent an additional six months reviewing the record of the ten day, fact-intensive trial. The truncated original opinion was withdrawn and replaced by a comprehensive opinion with record references demonstrating that the First Circuit had ultimately devoted substantial time to reviewing the record as a whole. The three judge panel reversed itself unanimously. As settled principles of appellate review of jury instructions dictate, the First Circuit reviewed the instructions as a whole and concluded that the jury had been properly guided by the District Court and that the answer to the special interrogatories foreclosed any possibility that the business judgment instruction would have made a difference in the facts of this particular case. 30A-32A.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES A MASSACHUSETTS STATUTE AND THUS NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.

The sole question presented by Airborne is whether a District Court's decision not to give a business judgment instruction violates the purpose and intent of Congress in enacting the ADEA. P. i. However, Airborne acknowledges that the judgment at issue is one in the amount of $3,136,858 which was entered pursuant to the Massachusetts statute and not pursuant to the ADEA. 2A.

Airborne argues in a footnote that Massachusetts law requires that a business judgment instruction be given.[8] P. 19, n. 10. Airborne cites no Massachusetts authority for that proposition. Neither *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 686 N.E.2d 1303 (1997) nor *Smith College v. MCAD*, 376 Mass. 221, 380 N.E.2d 121 (1978), cited by Airborne, even involve jury trials. Consequently, they do not involve jury instructions.[9] With respect to the

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[8] Airborne also argues in a footnote that "the First Circuit completely disregards the fact that the trial court specifically directed the jury that its finding on federal law was dispositive of the state law claim." P. 10, n. 6. This statement misrepresents the District Court's instructions and the decision of the First Circuit.

The District Court instructed the jury that if it actually found age to be a determinative factor in the decision to discharge, Kelley had carried his burden under both state and federal law. The District Court continued that if the jury did not find that age was a determinative factor in the decision to discharge, it should enter judgment for Airborne on the federal count but should consider whether Airborne's reasons were pretext in which case judgment would be appropriate without a specific age finding under the state statute.

The First Circuit did not disregard these instructions in rendering its decision. To the contrary, the First Circuit provided a detailed recitation of the jury instructions and specifically took into consideration the District Court's explanation of the special verdict form. In that regard, the First Circuit wrote: "If the jury answered Question 2 affirmatively, this finding was sufficient to enter judgment on both state and federal claims." 16A.

As set forth herein, the jury's express finding that Kelley's age was a motivating factor for his discharge rules out any possibility that the jury rendered a verdict based on disagreement with Airborne's business judgment and the First Circuit so held. 30A-32A.

[9] The Massachusetts statute is interpreted significantly differently than the ADEA. For instance, Massachusetts is a pretext only jurisdiction, *Blare v. Husky Injection Moldings System Boston, Inc.*, 419 Mass. 437,

state law claim, the First Circuit correctly concluded that "the absence of the business judgment instruction has no effect on the defendant's liability under ch. 151B." 33A. Since the First Circuit's decision rests on an adequate state law ground, the Court should not grant a writ of certiorari. *Wilson v. Loews Incorporated*, 355 U.S. 597, 598 (1958)(writ dismissed as improvidently granted because the judgment rested on an adequate state ground); *Colorado v. Nunez*, 465 U.S. 324 (1984)(same).

II. THE DECISION OF THE FIRST CIRCUIT IS NOT IN AN INTOLERABLE CONFLICT WITH THE EIGHTH CIRCUIT DECISION IN STEMMONS.

Based on the adequate state law ground for the judgment, certiorari is unwarranted. However, even if the ADEA was at issue, there is no meaningful conflict among the circuits. Both the First Circuit and the Eighth Circuit review the record as a whole to determine whether the absence of a business judgment instruction made a difference in the outcome of the case. Certainly, this does not constitute an intolerable conflict which deserves the attention of this Court.

In this case, the First Circuit was properly concerned with determining whether the absence of a business judgment instruction undermined the jury charge on the whole and took the jury's focus away from the governing principles of age discrimination. The First Circuit reviewed the record to determine whether a business judgment instruction under the facts of this particular case would have made a difference.

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646 N.E.2d 111 (1995), front pay is considered compensatory rather than equitable, *Conway v. Electro Switch Corp.*, 402 Mass. 385, 523 N.E.2d 255 (1988), and emotional distress is an available remedy. *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N.E.2d 881 (1993).

Critical to the First Circuit's reasoning was the fact that the jury answered a special interrogatory that age was a determinative factor in the decision to discharge Kelley. The First Circuit recognized that there was evidence to support the special finding and stated that it could not:

> . . .see how the jury could have thought it was free to find that age had a determinative influence on Kelley's discharge if it merely disagreed with Airborne's business judgment. The district court instructed the jury, on more than one occasion, that Kelley could prevail on his federal claim only if he proved by a preponderance of the evidence that he would not have been fired but for his age. 30A.

In reviewing the jury charge as a whole, the First Circuit wrote:

> These instructions did not permit or suggest that the jury could predicate a finding of age discrimination on their disagreement with Airborne's business judgment. 32A.

Finally, the First Circuit noted that the District Court properly focused the jury's inquiry on Airborne's state of mind at the time that the decision to discharge was made. 32A.

The First Circuit *did not* hold that it would be error to give a business judgment instruction.

Airborne asserts that the First Circuit's opinion is in conflict with Eighth Circuit jurisprudence set forth in *Stemmons v. Missouri Department of Corrections*, 82 F.3d 817 (8th Cir. 1996).[10] In that case, the Eighth Circuit held

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[10] *Thornley v. Penton Publishing Inc.*, 104 F.3d 26 (2nd Cir. 1997), cited by Airborne, is inapposite. That case does not involve a request

that a business judgment instruction should be given but that review of the record is necessary to see whether its absence affected the outcome of the case. *Id.* at 820. In *Stemmons*, the Eighth Circuit held that the absence of the business judgment instruction did not affect the outcome of the case and affirmed the jury verdict. *Id.* at 820.

Airborne argues that the Eighth Circuit found the absence of a business judgment instruction to be harmless only because there was evidence that suggested discriminatory animus. Airborne misrepresents the holding in *Stemmons*. In fact, the Eighth Circuit held:

> All of this evidence tends to undermine the department's proffered reason for denying Ms. Stemmons a promotion, and thus to establish that it was a *pretext*. In light of this evidence, moreover, we believe that the district court's failure to give a business judgment instruction was harmless error.

Id. at 821 (emphasis added).

The Eighth Circuit distinguished its prior holding in *Walker v. AT & T Technologies*, 995 F.2d 846 (8th Cir. 1993)(holding that the absence of the business judgment instruction was prejudicial) on the grounds that the plaintiff's evidence in *Walker* consisted primarily of the testimony of

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for a business judgment instruction. Rather, the Second Circuit held that it was error for the District Court to instruct the jury that plaintiff needed only to demonstrate that he was meeting the job qualifications of a *reasonable employer* as opposed to the actual expectations of the defendant. This instruction mandated reversal because it improperly stated the elements of the prima facie case. As set forth above, the First Circuit held that the District Court's instructions were correct on the principles governing employment discrimination.

co-workers who indicated that the plaintiff was the most qualified candidate for promotion. In fact, the evidence consisted of testimony by these other employees that they disagreed with the employer's decision. *Id.* at 850. Thus, the facts in *Walker* are different from those in *Stemmons* and the present case because in *Walker* there was no evidence of discriminatory animus and no evidence which undermined the defendant's credibility. *Stemmons*, 82 F.3d at 821.[11]

In *Stemmons*, the Eighth Circuit was satisfied that the business judgment instruction would not have made a difference, in part, because the defendant advised the jury of the business judgment rule in its closing argument. Airborne also advised the jury of the business judgment rule in its closing argument. A. 1865; 15A.

Two important facts which were present in the case at bar and do not appear to have existed in the *Stemmons* case are: (1) the jury in this case answered special interrogatories; and (2) the judge emphasized to the jury that Kelley could be discharged for any reason or no reason so long as it was not discriminatory. A. 1183-1184. All of these facts compel the conclusion that the jury verdict would not have changed if the requested instruction had been given.

There does not exist an intolerable conflict between the First and Eighth Circuits. Even if the ADEA judgment was at issue, the judgment would withstand Airborne's attack even under *Stemmons*. Of course, all of these arguments are irrelevant because of the adequate state law grounds for the verdict.

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[11] In *Walker*, the employer's reason for not promoting the employee was that it felt that another candidate for promotion was a "little bit better." *Walker*, 995 F.2d at 847.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE ABSENCE OF A BUSINESS JUDGMENT INSTRUCTION WAS HARMLESS.

The First Circuit and the Eighth Circuit agree that the absence of a business judgment instruction does not require reversal of a jury verdict. Consequently, this Court is being asked to review a 2,500 page record developed over the course of a ten day trial for the purpose of determining whether a three judge panel, which already reviewed the case twice, reached the correct conclusion that the jury's answer to the special interrogatory would not have changed if the instruction had been given. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also, Texas v. Mead*, 465 U.S. 1041 (1984).

IV. THE FIRST CIRCUIT'S OPINION THAT THE JURY'S EXPRESS FINDING OF AGE DISCRIMINATION COULD NOT HAVE BEEN BASED ON DISAGREEMENT WITH AIRBORNE'S BUSINESS JUDGMENT WAS CORRECT.

There are two ways for a plaintiff to prove that he was the victim of unlawful discrimination. He may produce direct evidence of discrimination or he may indirectly prove discrimination by showing pretext. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In the present case, Kelley introduced evidence which had a direct bearing on the issue of age animus. This included Simpson's age biased statement made in connection with the reduction in force, Goodwin's statements regarding the same subject matter, the discharge of the oldest person in

Kelley's region as a result of the reduction in force, the promotion of Bunyan to Vice President, the discharge of Kelley only weeks after a request to be made Vice President, and the replacement of Kelley by a thirty-seven year old. On this evidence, the jury accepted Kelley's explanation that he had been discharged because of his age.

The District Court devised a special verdict form which, when answered, disclosed whether the jury actually found evidence of age discrimination or whether the jury's verdict was based solely on its disbelief of the reasons asserted by Airborne. The first question asked:

> Has plaintiff proved that, at the time of his termination, he was performing his job sufficiently well to meet defendant's legitimate expectations?[12]

The jury answered "yes." The second interrogatory asked:

> If "yes" to question (1), has plaintiff proved that his age had a determinative influence on defendant's decision to discharge him?
>
> N.B. IF "YES," ENTER VERDICTS FOR THE PLAINTIFF ON BOTH COUNTS I AND II AND PROCEED DIRECTLY TO QUESTIONS (4a) AND (4b).

The jury answered "yes." The third interrogatory asked:

> If "no" to question (2), has plaintiff nonetheless proved that the reasons for discharge stated in the March 24, 1993 discharge letter

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[12] Airborne stipulated to the existence of the other elements of the prima facie case.

were pretextual -- i.e., that they were intended to mask *some other*, unstated reason for the discharge? [emphasis added].

N.B. IF "YES," ENTER A VERDICT FOR THE PLAINTIFF ON COUNT II ONLY AND PROCEED DIRECTLY TO QUESTION (4b).

The jury appropriately did not respond to this interrogatory. Interrogatories (4a) and (4b) asked whether the defendant knew that the discharge violated federal and state law, respectively. The jury answered "yes" to both. A. 268-269.

The District Court instructed the jury that an affirmative answer to the second interrogatory was appropriate only if Kelley persuaded the jury that Airborne's decision to discharge him was actually motivated by age animus. A. 1913; 1921; 1922. The District Court did not instruct the jury that it could answer interrogatory number 2 affirmatively based on a finding of pretext.

If the jury had not been convinced that age actually played a determinative role in the decision to discharge based on evidence of age animus, it was compelled to answer the second interrogatory in the negative. It would still have been permitted to find Airborne liable, under the state law instructions, without crediting evidence which had a direct bearing on the issue of age animus. Since the jury did not follow this course, it is impossible to conclude that the jury predicated its finding on pretext alone. The jury's affirmative finding that age was the reason for the discharge makes the business judgment instruction irrelevant.[13]

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[13] Where a jury has evidence bearing directly on the issue of age animus and finds discrimination without relying on an evaluation of the employer's stated reasons for the discharge, the business judgment instruction cannot affect its decision. Similarly, if the record demonstrates that the jury disbelieved the employer's asserted reasons, the business judgment

As discussed already, Airborne's decision not to inform the Court that the jury answered special interrogatories demonstrates that Airborne knows that the premise of its argument (i.e. that the verdict was based on pretext) is unsupported in the record. To recast the jury's answer to special interrogatories in order to make the question of business judgment even relevant presents a serious constitutional problem. To reexamine the facts in that fashion, would deprive Kelley of his Seventh Amendment right to a jury determination. *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108, 119 (1963)(jury's plausible view of the evidence must be upheld); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 335, 364 (1962)(generally discussing the high level of deference required to be given to special verdicts under the Seventh Amendment). Conversely, whether the absence of the business judgment instruction constitutes harmless error under the facts of this case presents no constitutional question.

The First Circuit was correct. Inclusion of a business judgment instruction would not have changed the jury's specific finding of age animus.

V. THE QUESTION PRESENTED IS NOT LIKELY TO ARISE IN THE FUTURE.

The First Circuit did not hold that a business judgment instruction should not be given. No District Court has been forbidden from giving such an instruction. Therefore, the question presented by Airborne's petition may never arise again. In fact, history demonstrates that the issue raised by Airborne's petition is not litigated often.

Airborne points out that jury trials have been available in certain discrimination cases since 1977 and in all discrimi-

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instruction cannot be of assistance because in that case the jury is evaluating the veracity of the reasons and not the legitimacy of the decision.

nation cases since 1991. Airborne further points out that for year ended June 30, 1998, there were 21,871 lawsuits commenced in federal district courts pertaining to civil rights claims in private employment settings. It is compelling that in its research, Airborne found only three federal cases aside from the present one which involved review of a district court's decision not to give a business judgment instruction. Two were Eighth Circuit opinions -- the later one merely clarified the holding of the earlier one. The other opinion located by Airborne was an unpublished opinion of the Tenth Circuit. All cases cited by Airborne hold that the absence of a business judgment instruction does not compel reversal and the courts in three of the four cases affirmed the judgment notwithstanding the absence of the business judgment instruction.

The district courts appear to be managing such cases competently and without confusion as to the principles governing employment discrimination law.[14] Certiorari is not warranted.

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[14] Airborne's argument that employers will fear discharging employees because, at a possible discrimination trial, the court might not give a business judgment instruction artificially credits employers with an awareness of the minute details of employment discrimination trial practice and thus is without merit.

CONCLUSION

For the reasons set forth above, the respondent, John Michael Kelley, respectfully requests that Airborne's Petition for Writ of Certiorari be **DENIED**.

Respectfully submitted,

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ADDENDUM

X. PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

A. **General.** FRAP Rules 40 and 35 should be consulted with respect to the procedures. Petitions for rehearing are intended to bring to the attention of the panel claimed errors in the opinion and they are not to be used for reargument of an issue previously presented.

B. **No Response.** No response is to be filed unless so requested by the Court.

C. **En Banc Processing.** When the petition contains a suggestion for a rehearing en banc, it is submitted by the Clerk to the panel that heard the case and to the other active First Circuit judges. The panel usually first acts as a panel and then the other judges have one week after notification of the panel action to indicate that en banc hearing is desired. The panel's decision and the decision on the en banc suggestion may be issued by separate orders or together as one order. A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel. See Local Rule 35.

D. **Vacation of Previous Opinion and Judgment.** Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.

Effective January 1, 1992.

(3)

Supreme Court, U.S.
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No. 98-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,
Petitioner,

v.

JOHN M. KELLEY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENT'S BRIEF FAILS IN ITS EFFORT TO OBSCURE THE CONFLICT CREATED BY THE FIRST CIRCUIT'S OPINION AND TO DENY THE IMPORTANCE OF THE LEGAL ISSUE SQUARELY RAISED BY THIS CASE.

Respondent Kelley's Opposition to Petition for a Writ of Certiorari ("Opp.") is an effort to distract the Court from the important legal issue raised by this case. This Reply responds in particular to the novel arguments raised by Kelley, none of which is sufficient to obscure that this case meets the standards of Supreme Court Rule 10 and should be reviewed by the Court.[1]

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[1] At the outset, Kelley levels a barrage of accusations of "misrepresentation" of the record against Airborne. These accusations

A. The Opposition Brief Confirms the Existence of an Important Conflict Among the Circuits.

In his Opposition, Kelley acknowledges, as he must, that there is a direct conflict between the First Circuit's decision in this case and the Eighth Circuit's decisions in *Stemmons v. Missouri Department of Corrections*, 82 F.3d 817 (8th Cir. 1996), *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993) and *Wolff v. Brown*, 128 F.3d 682, 685 (8th Cir. 1997). For several reasons, this Court should reject Kelley's attempt to minimize the importance of this conflict, an attempt which Kelley supports largely by labelling the conflict as "not intolerable" (Opp. at 16) and by distorting the Eighth Circuit's opinions.

Kelley simply cannot get around the fact that the Eighth Circuit stated that it *was error* to refuse to give a business judgment instruction when one is requested, *Stemmons*, 82 F.3d at 819, while the First Circuit stated expressly that "we find no error in the decision of the district court not to give a [requested] business judgment instruction," 32A. Put another way, the Eighth Circuit held that a business judgment instruction is "crucial to a fair presentation of . . . [an employment discrimina-

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lack substantive merit and appear to be designed to give the false impression that this case is too "fact-bound" to review. Airborne declines Kelley's apparent invitation to engage in an unnecessary and counterproductive factual debate about the record in this case. Airborne is confident that its Petition accurately characterizes the proceedings below, with one exception which Airborne would like to clarify. Kelley does correctly point out that the statement in Airborne's Petition that "the undisputed evidence at trial established that Guiod and Kelley 'hated each other's guts'" was inaccurate. However, the error was one of form—not of substance. Kelley introduced into evidence an e-mail from Airborne Senior Vice-President Van Bruwaenc to Simpson stating that "Guiod hates Kelley's guts and that don't help the situation" (A. 2315), and Kelley argued in his appellate brief that Guiod "hate[d] his guts" and that Kelley thought Guiod was a "backstabbing bastard." Kelley's Appellate Brief at 40; A. 1007, 2315.

tion] case, [and] the district court *must* offer it whenever it is proffered by the defendant." *Wolff*, 128 F.3d at 685 (emphasis added). The First Circuit has adopted a directly contrary rule.[2]

The Court should reject Kelley's attempt to minimize the conflict by blending together the separate analyses required for (1) determining whether error occurred and (2) determining whether the error was harmless or prejudicial—a different issue which is discussed in more detail below. On the question of "what is error," both the Eighth Circuit and the Second Circuit in *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26 (2d Cir. 1997), recognize that it is crucially important for the jury to understand the role of the employer's business judgment, and that it is error not to give a requested instruction.[3]

Notably absent from Kelley's Opposition are any of this Court's decisions on the importance of the jury's correct understanding of the role of the employer's business judgment, and thus, by extension, the extreme importance of the type of instruction requested by Airborne. Also absent is any reference by Kelley to Congress's intent and the purpose of the ADEA, both of which are key to understanding the importance of this case. Airborne

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[2] Kelley again attempts to divert the Court by noting the irrelevant point that "[t]he First Circuit *did not* hold that it would be error to give a business judgment instruction." Opp. at 17. By focussing on what the First Circuit did not hold, Kelley avoids the disturbing policy implications of what it did hold—that it is not error for a trial judge to refuse to give a business judgment instruction when the employer's business judgment is directly at issue under the pretext analysis required by *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and its progenitors.

[3] In *Thornley*, the Second Circuit rejected the notion that the failure to give correct instructions could be harmless when the instructions given "permitted the jury to infer discrimination based upon whether the jury found the employer's standards to be reasonable." 104 F.3d at 30. Airborne stands by the conclusion that *Thornley*'s holding is essentially on all fours wit· the Eighth Circuit's position.

refers the Court again to pages 15-23 of its Petition for a discussion, which Kelley has left completely untouched, on the importance of the jury receiving a business judgment instruction in a pretext case such as this.[4] But it is worth again quoting this Court in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), where it is stated: "Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review." *Id.* at 524.

B. The Prospect of Conducting a Harmless Error Analysis Does Not Make This Case Any Less Worthy of Certiorari Review.

Contrary to the implication of Kelley's suggestion that this Court would need to "review a 2,500 page record

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[4] There is no merit to Kelley's surprising attempt to assert that the present case, which Kelley tried as a "pretext case" and which the Court considered a "pretext case," is not in conflict with the Eighth Circuit's decisions because the present case is really a case in which age bias has been proven through the direct evidence approach elucidated by the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). It is simply not true that Kelley "presented evidence which had a direct bearing on the issue of age discrimination," and that the jury's answer to Interrogatory No. 2 was based solely on this evidence. Opp. at 8. As the First Circuit noted in its Opinion No. 1, the evidence of age bias was "*indirect* and far from overwhelming." 57A (emphasis supplied). This case was tried under the circumstantial evidence, tripartite burden shifting framework for disparate treatment cases elucidated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *Hicks*, not on a *Price Waterhouse* "direct evidence" model. The trial court's jury instructions tracked the *McDonnell Douglas* paradigm. In Interrogatory No. 2, the jury was presented with a question which, if anything, confusingly squashed together the jury's consideration of questions of "pretext" and "direct evidence." Indeed, Kelley himself argued in his appellate brief, with respect to Interrogatory No. 2, that "*the jury* answered that age was a determinative factor in the decision to discharge Mr. Kelley and thereby *implicitly found pretext*." Kelley's Appellate Brief, at 15 (emphasis supplied).

developed over the course of a ten day trial for the purpose of determining whether . . . [the First Circuit] reached the correct conclusion," Opp. at 20, Airborne's Petition is not seeking a "review [of the] evidence and discuss[ion] [of] specific facts." *Id.* Rather, the focus of any decision by this Court would be on the principle of law that is in conflict between the Circuits.

Of course, in any case involving error by the trial court, the appellate court must ultimately review the entire record to determine whether the error was prejudicial or harmless. *See Stemmons*, 82 F.3d at 821 (concluding that, in light of the bountiful direct evidence of discriminatory bias against the plaintiff, the failure to issue the business judgment instruction was harmless error).[5] This is precisely what the First Circuit did initially. Relying on *Stemmons* and *Walker*, it concluded that the trial court's failure to give the business judgment instruction was error.[6] Opinion No. 1, 56A ("At least one of our sister circuits requires that the trial judge give a business judgment instruction when requested by the

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[5] If the mere threat of having to conduct a harmless error review is sufficient to deter this Court from reviewing an important issue as to what jury instructions in ADEA cases *ought to be*, then this Court would never take a jury instruction issue for review, as Fed. R. Civ. P. 61 on its face always requires harmless error review for alleged errors in jury instructions.

[6] In *Stemmons*, a race discrimination case, the Eighth Circuit reiterated the general rule mandating a business judgment instruction that it had articulated in *Walker, supra*. *Stemmons*, 82 F.3d at 819. However, the *Stemmons* court found that, given abundant, direct evidence of discriminatory animus, failuure to give an instruction on the business judgment rule was harmless error. *Id.* at 821. In doing so, the *Stemmons* court contrasted the record in *Walker*:

> In *Walker*, the plaintiff's case consisted primarily of the testimony of co-workers who indicated that the plaintiff was the most qualified candidate. None of that testimony directly indicated that the plaintiff's age . . . played a part in the hiring decision. In this case, on the other hand, the jury heard testi-

defendant."). Next, the court addressed the issue of whether the error was prejudicial. It concluded that, given the "considerable evidence of conduct by Airborne that might be considered unfair, but that does not suggest discrimination on the basis of age," and the fact that the evidence of age bias was "indirect and far from overwhelming," the refusal to give the instruction "cannot be termed harmless error." 57A.

But in the second opinion, the First Circuit never actually conducted a harmless error analysis. It concluded instead, as noted above, that it was not even error to refuse to give the requested instruction. 32A. Because of this, the First Circuit's second opinion incorrectly assesses the impact that the business judgment instruction might have had on the jury by considering the evidence "in the light most favorable to the verdict winner." 2A, *citing Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 151 (1st Cir. 1990). Of course, if the First Circuit had found error and were undertaking a true harmless error analysis, instead of seeking to find the best argument to justify the verdict, it would have been required to view the record as a whole to determine whether the verdict could have been affected by the error that was made. *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 737 (1st Cir. 1994).[7]

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mony that very strongly suggested that race affected the hiring decision.

Id. Where, as here and as in *Walker*, the determination of unlawful bias turns on the issue of pretext, rather than direct evidence, a jury instruction on the business judgment rule is "crucial to a fair presentation of the case to the jury," and failure to give that instruction is reversible error. *Walker*, 995 F.2d at 849; *Stemmons*, 82 F.3d at 819.

[7] The Court should bear in mind that the issue presented on appeal was not whether there was sufficient evidence to support the jury's verdict. Airborne's appeal did not press the trial court's failure to grant its motion for judgment as a matter of law. Its appellate position was that the trial court's instructional errors were prejudicial. Accordingly, the First Circuit's reliance on

Here, there is a clear basis for finding that the lack of the requested business judgment instruction could not have been harmless error. In addition to the express finding in Opinion No. 1 to that effect, the record as a whole shows that Airborne presented ample evidence to support a finding that Kelley was discharged because of a complete breakdown in his working relationship with Guiod. Such a finding would have permitted a jury finding in Airborne's favor if the jury had been properly instructed to defer to Airborne's business judgment and had not been invited to consider the fairness of discharging an employee shortly after he received a positive performance review. *See Sullivan v. National Football League*, 34 F.3d 1091, 1107, 1109 (1st Cir. 1994) (ordering a new trial where "review of the record as a whole" revealed that erroneous jury instructions were prejudicial; appellant "presented facts that could have led to a dismissal of the case if they were believed by a properly instructed jury[]"), *cert. denied*, 115 S. Ct. 1251 (1995).

C. There Are No Adequate and Independent State Grounds Which Would Preclude This Court's Review of This Case.

No weight should be given to Kelley's assertion that the judgment below was based solely upon state law or that there are adequate and independent state grounds for the

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Cumpiano is misplaced. While viewing the evidence in the light most favorable to plaintiff was appropriate in *Cumpiano*—an appeal challenging the sufficiency of evidence and the factual findings made after a bench trial—Airborne was not arguing sufficiency of the evidence. Accordingly, in this appeal, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." 11 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 2883, at 447 (1995) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762 (1946) and applying standard to civil litigation).

First Circuit's decision. As Airborne pointed out in its Petition at 10 n.6, the trial court specifically directed the jury that its finding on federal law was dispositive of the state law claim: "if you rule in favor of the plaintiff in the federal claim, it's automatic that he wins in the state. You get to the state claim only if he loses on the federal." ADD. 38. Clearly, the jury could not have considered the state law claim "independent" if it was instructed by the Court to find liability on the basis of the federal standard. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (no adequate or independent state grounds when opinion or judgment was based on conclusion that federal law compelled a certain state-law result).[8]

Put another way, by answering Interrogatory No. 2 in the affirmative ("has the plaintiff proved that his age had a determinative influence on the defendant's decision to discharge him"), the jury found that plaintiff had met his "pretext plus" burden under *Hicks*. It was therefore unnecessary for the jury to engage in the "pretext only" analysis that the judge believed was required under Mas-

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[8] The First Circuit was clearly wrong to state that Airborne had somehow waived the business judgment instruction issue with respect to the state law claim. *See* 32A-33A (stating that even if there was error under federal law, the state law claim would be unaffected because "Airborne does not suggest that the failure to provide the business judgment instruction constitutes reversible error under Massachusetts law"). In fact, Airborne specifically argued on appeal that Massachusetts "has likewise adopted the business judgment rule in construing chapter 151B[,] *Smith College v. MCAD*, 376 Mass. 221, 229, 380 N.E.2d 121, 127 (1978)," and that "the need for such an instruction in this case was even greater given the confusing 'pretext only' analysis applicable to Kelley's state-law claims . . . . If the trial court was correct that proof of pretext alone *requires* a plaintiff's verdict under *Blare v. Husky Injection Molding System*, 419 Mass. 437, 646 N.E.2d 111 (1995), clear jury instructions on the meaning of pretext and the business judgment rule were even more indispensable." *See* Airborne's First Circuit Reply Brief, at 13 n.23, 15.

sachusetts law, and per his instructions the jury entered a verdict for the plaintiff on both his federal ADEA claim and his state law claim. Accordingly, Airborne's liability in this case was predicated on a finding under federal law that Kelley's discharge violated the ADEA, and the state-law issues relating to remedies flowed from that finding of liability under federal law.[9]

CONCLUSION

For the reasons set forth in its Petition and this Reply, Airborne respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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[9] At various places in the Opposition, Kelley makes the meritless argument that, because Airborne correctly noted the total dollar liability imposed by the combined judgment to be $3,136,858, that Airborne somehow cannot be challenging the federal law portion of that judgment, but is really challenging a state-law judgment. *See, e.g.*, Opp. at 3, 14. There is no support whatsoever for such a contention, particularly since it is undisputed that liability was found on the basis of a special jury question that was based upon the federal claim, and judgment was entered solely on that basis. For all the reasons stated above and in the Opposition, this case properly and squarely presents the federal issue under the ADEA that is stated in the Question Presented.